TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1935

No. [redacted] 147

JAMES McDONALD, Jr., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 19, 1935

CERTIORARI GRANTED OCTOBER 12, 1935

(31,278)

(31,278)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 555

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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[fol. 1] **IN SUPREME COURT OF DISTRICT OF COLUMBIA**

No. 4251

JAMES MCDONALD, JR., &c., et al.

vs.

LAWRENCE MAXWELL et al.

LAST WILL AND TESTAMENT AND CODICIL OF JAMES MCDONALD—Filed January 19, 1915

(A) I James McDonald a citizen of the United States of America at present residing at 57 Cadogan Square London, England—temporarily—make this as and declare it to be my last Will and Testiment. All previous Wills are hereby revoked.

(B) I request that all my debts at the time of my death and all the expenses attending my death and funeral be paid as promptly as possible and that my wife and all others who are dependant on me and are provided for in this Will, be supplied with such funds as may be necessary for them pending the carrying out of the provisions hereinafter stated applying to them.

(C) I bequeath to the following named persons—during their lives—the Annuities stated, to be paid to them at such times and in such amounts as they may desire;

To Mrs. Nellie Carpenter My Niece Three thousand dollars ($3000-).

To Mrs. C. H. Falloon My Mother-in-law Twenty four hundred dollars ($2400-).

To Mrs. Sarah E. Fraser My Cousin by Marriage Twelve hundred dollars ($1200-).

To Mrs. Helen B. Rule My Sister-in-law Nine hundred dollars ($900-).

To. Mr. Robert Sanders My Brother-in-law Twelve hundred dollars ($1200-).

(D) I bequeath to the following named persons the amounts stated, to be paid to them as soon as legal formalities and financial arrangements will permit.

To Mrs. Flora Lourie My Grand Niece Twenty thousand dollars ($20000-).

To Mrs. May Affeld Adopted child of my sister Ten thousand dollars ($10000-).

To Mrs. Mamie Edward My Cousin (second) Ten thousand dollars ($10000-).

To Miss Helen Fraser of Columbus, Ohio, Five thousand dollars ($5000-).

[fol. 2] To Miss May Fraser of Columbus, Ohio, Five thousand dollars ($5000-).

To Miss Jessie Fraser of Columbus, Ohio, Five thousand dollars ($5000-).

To Miss Clara Bowen of Pierre, S. Dakota, Ten thousand dollars ($10000-).

To Miss Lillie Bowen of Pierre, S. Dakota, Ten thousand dollars $10000-).

To Mrs. Hugh Gibson of Cincinnati, O., Three thousand dollars ($3000-).

To Mrs. James Holmes of Cincinnati, O., Three thousand dollars ($3000-).

To Mrs. Mary Weitzel of Cincinnati, Ohio, Three thousand dollars ($3000-).

To Mrs. Alex Murison of Chicago, Ill., Three thousand dollars ($3000-).

To Mrs. Cora E. Rower of Wayne, Pa., Ten thousand dollars ($10000-).

To Mr. J. McD. Holtzinger of Wayne, Pa., Ten thousand dollars ($10000-).

To Mr. Wm. R. Palmer of Chicago, Ill., Three thousand dollars ($3000-).

To the Protestant Widows' and Old Men's Home in Cincinnati, O., Ten thousand dollars ($10000-).

(E) I bequeath to Alis T. Wrench my Step Daughter in trust for her two children Dilkusha an- John Wrench and her Nephew James Jeram Briggs the sum of sixty thousand dollars ($60000-) being twenty thousand dollars ($20000-) for each of the three. She may pay out any part or all of both interest and principal that may be necessary for their proper support and education and when they arrive at legal age she may either pay over to them the amount then due or continue to them as much as may be sufficient for their support until the- reach the age of thirty

years when she must pay over to them the amounts then due to them. If any of the three should die in the meantime leaving no issue—the shares of the deceased shall be divided share and share alike between the survivors.

(F) I bequeath to the following named servants—provided they are still in my service at the time of my death:

To Christina Watson Housekeeper One thousand pounds sterling (£1000-).
To Mrs. Johnson Cook One thousand pounds sterling (£1000-).
To Jessie Kittredge Housemaid Six hundred pounds sterling (£600-).
To J. Walter Jones Butler Eight hundred pounds sterling (£800-).
I also cancel Jones indebt-ness to me of £400.

(G) I bequeath to my Wife Charlotte Jane Isabelle—if she survives me six hundred shares (600) of the stock of the Standard Oil Co. of New Jersey and a prorata (600/983383) of the stocks of all the companies formerly subsidiaries of the said Standard Oil Co. of New Jersey stocks of which I am the owner at the time of my death. [fol. 3] This is in addition to the one hundred and fifty thousand dollars ($150000-) due to her from me under our ante-nuptial agreement.

If she shall have died before me and I have not otherwise provided by will or codicil and one third (1/3) of this bequest shall go to her son Arthur B. Campbell, one third (1/3) to her sister Mrs. Bernard Menser—or issue—and one third (1/3) to my Niece Nellie Carpenter her issue or direct descendants. In event of any of these three having died leaving no issue or direct descendants the share or shares of the deceased shall go to the survivor or survivors, or the issue or direct descendants of such survivor or survivors.

(H) I bequeath to my wife—Charlotte Jane Isabelle—in trust for her son Arthur B. Campbell two hundred (200) shares of the stock of the Standard Oil Co. of New Jersey and a prorata (200/983383) of the stocks of all the Companies formerly subsidiary to the said Standard Oil Co. of New Jersey of which I am owner of stocks at the time of my death. She may pay over to him any part or all of

both interest and principal as she may deem desirable until he reaches the age of thirty years when she must pay over to him the entire amount then remaining in the fund.

(I) I bequeath to my son James McDonald Jr. an Annuity of ten thousand dollars $10000—until he reaches the age of twenty six (26) years—After that age until he reaches the age of thirty (30) years the Annuity shall be twelve thousand dollars ($12000-) From the age of thirty (30) years during his life or until the estate is divided as hereinafter provided the Annuity shall be fifteen thousand dollars ($15000). James shall also have an annual allowance of twenty five hundred ($2500) for each child his wife may bear him until the child reaches the age of fifteen years (15) after that the allowance shall be three thousand dollars ($3000) until the child reaches the age of twenty one (21) years.

(J) I bequeath to James my library now contained in my present residence on condition that he keeps it intact for his eldest son after his own death. The executors shall pay the expenses of packing and transport to such place as James may designate. I also bequeath to James the jewelry now in my possession which was worn by his Mother as family jewels. These jewels may be worn by his wife during her life time. After her death the jewelry shall go to her eldest son or his issue if he shall have died leaving issue. If the eldest son shall have died leaving no issue the jewels shall go to the next eldest son or his issue or failing such to the third eldest or issue my desire being that the jewelry continues to be worn by a McDonald so long as a direct descendant of mine is alive. If no son of James or issue of a son is living at the time of the death of his wife the jewelry shall go to the eldest living daughter. I also bequeath to James all the pictures and other effects—now contained in my present residence—which are in any way connected with himself, his Mother's family—or my own—the McDonald—family except a portrait of myself by Nowell which is the property of my wife, Charlotte J. Isabelle.

[fol. 4] (K) I hereby authorize the executors to invest in any business of which they approve and in the management of which James must take an active part any sum not exceeding One hundred thousand dollars ($100,000-). All prof-

its resulting from the investment shall go entirely to James but the principal shall remain part of the estate until the estate is divided in accordance with the provisions hereinbefore stated and may be recalled by the executors if thedeem it desirable to do so before the division takes place. I also hereby authorize my executors to have built for James a residence at such time and place as he may designate at a cost of not exceeding thirty thousand dollars ($30000-).

(L) There being a mortgage of eight thousand pounds (£8,000) on my residence 57 Cadogan Square London Eng. and as I do not desire to increase my investment in England if the present holder of the mortgage will not consent to extend the time for a period not exceeding two years or if the mortgage cannot be transferred to some other party on the same terms and for a period not exceeding two years—the property shall be sold as soon as this can be done without to- great a sacrifice. If however the present holder of the mortgage or *or* a successor on the same terms shall extend the time of the mortgage for a term not exceeding two years (2) my wife may occupy it for any part of that period the executors paying all interest, rates, taxes, ground rent and insurance during her occupancy. At the expiration of the two years or earlier if my wife should cease to occupy it, the property shall be sold the proceeds to be part of the estate. The pictures, furniture—ornaments and all the other effects contained in the house—excepting such as may still remain which I hereinbefore bequeathed to James, and my portrait by Nowell the property of my wife, and all other properties and effects which are the personal effects of my wife—shall be divided equally between my wife and James in such manner as they may agree on between themselves.

(M) Each child of James, by his wife, shall after reaching the age of twenty one (21) years receive an annuity of four thousand dollars ($4,000-) until the oldest surviving one shall reach the age of thirty (30) years when if James is still living the estate shall be divided as follows: One half (½) shall go to James the remain-ng one half (½) shall be divided between the children share and share alike. If any of the children shall have died before reaching the age of thirty (30) years leaving a wife and child or chil-

dren the share of such child shall go to the wife and child or children in such manner as the executors may deem best. The share of the child who has reached the age of thirty years shall be made over to him at once but the shares of those who have not reached that age shall be held in trust by the executors and shall be made over to them as the reach the said age. The share or shares of any child or children who may have died before reaching said age, leaving a wife and issue may be divided between the wife and issue at such time and in such manner as the executors may deem best. This provision appl-es in the event of the deceased child being a woman in which case the word husband shall be substituted for that of wife.

[fol. 5] (N) If James should die leaving a wife and issue the widow shall receive from the Estate an annual allowance of fifteen thousand dollars ($15,000) until the first child of James shall reach the age of thirty (30) years when if still living she shall receive one third (⅓) of the estate the remaining two thirds (⅔) shall be divided among the issue in the manner set forth in paragraph M.

(O) If James should die leaving a widow but no children or issue of children, the Widow shall receive one third of the estate and the remaining two thirds (⅔) shall be divided equally between my Niece Nellie Carpenter of her direct descendants—the direct descendants of my present wife—the direct descendants of my first wife (Carrie Rule) and the Protestant Widows' and Old Men's Home in Cincinnati, O.

(P) If James should die leaving neither widow nor issue nor direct descendant of issue the entire estate shall be equally divided between the beneficiaries named and in the manner set forth in Paragraph O.

(Q) If James should die leaving a widow she shall have during her life the use free of rent of any residence that may have been built for James under the provision set forth in Paragraph K.

(R) I hereby appoint Lawrence Maxwell of Cincinnati, O. and the Fulton Trust Co. 149 Broadway New York to be the first executors of this Will and Testament. They shall have as full and complete powers as regards the manage-

ment of the estate as I myself would have if living—it being understood however that they shall carry out all the provisions set forth in this Will and any Codicil or Codicils I may hereafter make to it. They shall have power to nominate a successor to either of them who may desire to retire from the Executorship or who may from any cause be unable to fulfil the duties of executor. This authority shall extend to all their successors. In the event that—from some unforeseen reason only one of the executors is available to attend to any matter requiring immediate attention such executor shall have all the power and authority that could be exercised by the two acting together. If a successor to a retiring director has not been nominated prior to the retiring executor having ceased to act—the remaining executor shall in consultation with my son James—if he is then living—nominate the successor. If James is not then living the surviving executor shall with the approval of the court having jurisdiction nominate the successor. It is natural and desirable that the Fulton Trust Company should be the custodian of the assets of the estate but all transactions of any nature outside of those demanded by the provisions — this Will and any Codicils shall have the approval of the other if another exists at the time. As long as Lawrence Maxwell continues to be an executor he snall — full charge of all legal matters pertain/ing to the executorship. The executors shall have the power to have this Will probated in any court they may select—if in the meantime I have not acquired a residence in the United [fol. 6] States. The executors shall receive such remuneration as is customary in such cases and shall not be required to furnish any bond or security.

(S) I desire that this Will shall not be made public if this can be legally avoided.

Witness my hand and seal this twenty sixth day of June, 1913.

James McDonald. (Seal.)

Witness

We the undersigned bear witness that James McDonald is well known to us personally, that he has declared to us that this document is his last Will and Testament, that we

have seen him sign and seal it, and that we fully believe him to be in such condition both physically and mentally as to enable him to make a Will with due care and consideration. We have further heard him declare that he is a citizen of the United States of America at present residing in London, England but having the intention of retur-ing to and again taking up his residence in the United States when circumstances will permit.

F. E. Powell, Rockwood, Walton-on-Thames. James S. Hack, "Conway," Hallswelle Road, Golder's Green, N. W.

I, James McDonald a citizen of the United States of America at present temporarily residing at Number 57 Cadogan Square London, England do make publish and declare this to be a Codicil to my last Will and Testament bearing date the 26th day of June in the year One thousand nine hundred and thirteen in manner and form following that is to say,

First. I do hereby revoke and annul the annuity of Three thousand Dollars given and bequeathed to my niece Mrs. Nellie Carpenter by paragraph C of my said will and in place and stead thereof I give and bequeath unto my said niece Mrs. Nellie Carpenter an annuity of Three thousand six hundred Dollars during her natural life.

Second. I do hereby revoke and annul the annuity of Two thousand four hundred Dollars a year given and bequeathed to my mother-in-law Mrs. C. H. Falloon by paragraph C of my said will for and during her natural life and in place and stead thereof I give and bequeath unto my said mother-in-law Mrs. C. H. Falloon an annuity of Three thousand Dollars during her natural life.

Third. I hereby revoke and annu*a*l the paragraph of my said will designated "I" and in the place and stead thereof I do hereby give and bequeath to my son James McDonald an annuity of Fifteen thousand Dollars until he reaches the age of twenty-six years after that age until he reaches the age of thirty years the annuity shall be Eighteen thousand Dollars from the age of thirty years during his life or until the estate is divided as provided in said will the annuity shall be Twenty thousand Dollars James shall also have an [fol. 7] additional annuity of Twenty-five hundred Dollars

for each child his wife may bear him and living at my decease until the child reaches the age of fifteen years after that the said additional annuity shall be Three thousand Dollars until the child reaches the age of twenty-one years.

Fourth. I hereby revoke and annul the latter part of the paragraph of my said will designated "J" which reads as follows: "I also bequeath to James all the pictures and other effects now contained in my present residence which are in any way connected with himself his mother's family or my own the McDonald family except a portrait of myself by Nowell which is the property of my wife Charlotte J. Isabelle" and I also revoke and annul the latter part of the paragraph of my said will designated "L" which reads as follows:—"the pictures, furniture ornaments and all other effects contained in the house excepting such as may still remain which I hereinbefore bequeathed to James and my portrait by Nowell the property of my wife and all other properties and effects which are the personal effects of my wife shall be divided equally between my wife and James in such manner as they may agree on between themselves" and in place and stead thereof I hereby provide as follows: All my household furniture useful and ornamental china, engravings, paintings, statuary bronzes and all other works of art ornament or curiosity of which I was possessed previous to my marriage to my present wife I give and bequeath unto my son James McDonald and all household furniture useful and ornamental china engravings, paintings, statuary bronzes and all other works of art ornament or curiosity which I have acquired since my marriage to my present wife I give and bequeath unto my wife Charlotte J. Isabelle McDonald.

Fifth. It is my will and I hereby direct that I be interred in the mausoleum situated in my plot in Brompton Cemetery London, England and I hereby give and devise my said plot of ground in the said Brompton Cemetery with the mausoleum erected thereon unto my said son James to have and to hold the same unto him his heirs and assigns for-ver.

And it is my will and I desire that the remains of my present wife be placed in the mausoleum in my said plot in said Brompton Cemetery if my said wife should so desire.

Sixth. I hereby revoke all and every part of the paragraph of my said will designated "K" and in place and

stead thereof I hereby authorize and empower my said Executors to advance unto my said son James from my said estate a sum not to exceed Fifty thousand Dollars and I hereby give and bequeath the same unto my said son James for the purpose of erecting a house at such time and place as my said son James may designate.

Lastly. In all other respects I do hereby ratify and confirm my said will and hereby republish and declare the same except as herein and hereby modified to be my last will and testament.

In witness whereof I have hereunto set my hand and affixed my seal this the fourteenth day of April in the year One thousand nine hundred and fourteen.

James McDonald. [Seal.]

[fol. 8] Signed sealed published and declared by the testator James McDonald as and for a codicil to his last will and testament in the presence of the undersigned who at his request in his presence and in the presence of each other have hereunto subscribed their names as witnesses.

That the said James McDonald is well known to us personally and that we fully beli-ve him to be in such condition both physically and mentally as to enable him to make a will with due care and consideration. We further heard him declare that he is a citizen of the United States of America at present temporarily residing in London, England but having the intention of returning to and taking up his residence in the United States in the near future.

Arthur J. Morris, 602 West 137th St., N. Y. City.
John A. Mack, 650 West 163" St., N. Y. City.

[File endorsement omitted.]

In Supreme Court of District of Columbia

Petition for Letters Testamentary—Filed in Probate Court January 20, 1915

The petition of Lawrence Maxwell, a citizen of the United States and a resident of the City of Cincinnati in the State of Ohio, and Fulton Trust Company of New York, a corporation under the laws of the State of New

York, with offices at 149 Broadway, New York City, respectfully shows unto this Honorable Court as follows:

1. James McDonald, a citizen of the United States and a resident of the City of Washington in the District of Columbia, departed this life at his home, 1701 Twenty-second Street, Northwest, in said City of Washington, on to wit the 13th day of January, A. D., 1915.

2. Said decedent, at the date of his death, was not to the knowledge of these petitioners seized or possessed of any real estate with the possible exception of an interest, the exact nature of which is at present unknown to these petitioners, in premises designated as 57 Cadogan Square, London, England.

3. Decedent possessed personal property and estate as follows:

a. An existing lease on premises 1701 Twenty-second Street, Northwest, Washington, D. C.

b. Jewelry, household furniture and effects, in Washington, District of Columbia, and elsewhere, of a value estimated to be in excess of $5,000.00.

c. Stocks, bonds, and other securities and evidences of debt of a value estimated to be in excess of $1,000,000.00.

4. Said decedent left him surviving his widow, Charlotte Jane Isabelle McDonald, and one child, James McDonald, [fol. 9] Jr., of full age, the former residing at 1701 Twenty-second Street, Northwest, in said City and District, and the latter residing at Hailey, Idaho. Other than said son, James McDonald, Jr., said decedent left no next of kin or heir at law.

5. Said decedent, so far as these petitioners are informed and believe, left no debts other than those incident to his last illness and burial, and current bills for household expenses of a total aggregate of about $5,000.00.

6. Decedent left a last will and testament dated June 26, 1913, and a codicil thereto dated April 14, 1914, both of which instruments have been delivered to the Register of Wills of the District of Columbia, and are now offered for probate.

7. By his said last will and testament said decedent nominated your petitioners, Lawrence Maxwell and Fulton Trust Company of New York; as executors of his said last will and testament, and provided that said nominees should not be required to furnish any bond or security.

Wherefore, your petitioners, believing themselves to be entitled to letters testamentary on said estate, pray that said last will and testament and codicil thereto of said James McDonald, deceased, may be admitted to probate and record, and that letters testamentary may be issued to them accordingly.

Lawrence Maxwell, Fulton Trust Company of New York, by Edward De Witt, Attorney.

Duly sworn to by Lawrence Maxwell. Jurat omitted in printing.

[File endorsement omitted.]

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER ADMITTING WILL TO PROBATE—Filed in Probate Court January 20, 1915

On consideration of the Petition of Lawrence Maxwell, and Fulton Trust Company of New York, and the waivers of citation signed by the widow and all of the heirs at law [fol. 10] and next of kin of James McDonald, deceased, and it appearing to the Court that the will of the said James McDonald bearing date of June 26th, 1913, and the codicil thereto bearing date of April 14th, 1914, have been duly filed, and the Court, upon hearing the proofs submitted, being satisfied that the said will and codicil were duly executed, and that the testator was competent to execute the same, and no caveat having been filed against the admission of the same to probate, and it further appearing to the Court that said instrument bearing date of June 26th, 1913, is in the handwriting of the said James McDonald, it is this 20th day of January, A. D., 1915,

Adjudged, ordered and decreed that said will and codicil be and the same are hereby admitted to probate and record

as a will of both real and personal estate and that letters testamentary thereon issue to said Lawrence Maxwell, and Fulton Trust Company of New York, the executors by said will appointed, upon their giving bond in the sum of Seven Thousand Dollars, conditioned for the faithful performance of their duties as executors.

Walter I. McCoy, Justice.

[File endorsement omitted.]

In Supreme Court of District of Columbia

Order Appointing Guardian ad Litem—Filed in Probate Court December 5, 1918

Upon consideration of the filing by the executors in this cause of a fourth account on the 29th day of August, A. D., 1918, praying among other allowances for the allowance of commissions, it is by the Court this 5th day of December, A. D., 1918,

Adjudged, ordered and decreed that Charles V. Imlay, be and he is hereby appointed guardian ad litem for James McDonald, 3rd, and Robert Alexander McDonald, minors, to make such investigation as the premises may demand and to answer under oath concerning the matters involved in said account, and any further account which may be filed by said executors.

Jennings Bailey, Justice.

[File endorsement omitted.]

[fol. 11] In Supreme Court of District of Columbia

Report of Guardian ad Litem to Ninth Account—Filed in Probate Court October 22, 1923

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Report of Guardian ad Litem to Ninth Account

This guardian ad litem (hereinafter referred to as "guardian") was, by a special order of this Court passed on December 5th, 1918, appointed guardian ad litem for James McDonald, third, and Alexander McDonald, infants, born respectively on the 10th day of September, 1913, and the 12th day of May, 1915, in reference to the Fourth Account of the executors "to make such investigation as the premises may demand and to answer under oath concerning the matters involved in said account and any further accounts which may be filed by said executors."

Pursuant to the above order, this guardian has filed reports in connection with the Fourth, Fifth, Sixth, Seventh, and Eighth Accounts (a former report filed by this guardian in connection with the Third Account was under a previous order of appointment). Accordingly, upon the filing of a statement for the Ninth Account, August 15, 1923, covering the administration of this estate for the year from July 11, 1922, to July 12, 1923, this guardian has, in pursuance of the aforesaid order of appointment, investigated said ac-

count and the matters connected therewith in the respects hereinafter set forth and begs to submit his conclusions for the consideration of the Court.

I

The Interest of the Infants

The interest of the infants in this accounting is identical with that in former accountings. This interest arises under the provisions of Paragraphs "M" and "N" of the testator's will of June 26, 1913. Under Paragraph "M" is [fol. 12] provided that the entire estate shall, in certain contingencies named in said paragraph, be divided one-half to the father of the infants James McDonald, Jr., the son of the testator, and the other half to the infants themselves, and under Paragraph "N" of the will it is provided that the estate, in certain contingencies named, shall be shared one-third to the widow of James McDonald and two-thirds to his children. Accordingly, the interest of the infants is affected by any expenditure, either of principal or interest, because all expenditures will tend pro tanto to reduce the ultimate remainder of said children.

The statement made with reference to the interest of the infants is subject to modification according to the outcome of the Equity suit of James McDonald, Jr. vs. Beulah McDonald, et al., Equity No. 40,082, now pending in the Supreme Court of the District of Columbia, in which construction is sought by the plaintiff, the father of the children named, of the will of the deceased which would, if his contentions prevail in full, entirely nullify the interest of the infants. This matter is under advisement by the Court.

II

Scope of Investigation

An examination has been made of the original statement for an account on file at the office of the Register of Wills. Although no attempt has been made to duplicate the work of the accountants in that office, an examination has been made of the vouchers in connection with the account to the extent that it has been deemed of importance to the children

represented here, and a general comparison has, therefore, been made of disbursements for legacies, listings of investments and other matters in connection with similar disbursements in previous accounts which have received the approval of the Court after a similar report by this guardian. The account has been found, from this standpoint, to be in proper shape and consistent with previous accounts when explained by the facts hereinafter set forth.

The entire subject matter of the account has been investigated in personal conferences had with James S. Flannery, Esquire, of McKenney and Flannery, local counsel for the executors, and in conferences in New York City, September 22nd, 1923, with Mr. Van Kleeck, vice-president of the Fulton Trust Company, one of the executors and Edward De Witt, Esquire, one of the New York attorneys for the executors.

A study has also been made of the investments as they now stand in comparison with the status of these investments over the previous accounting periods. A comparison has been made of prices and of the dividend history of the various securities, particularly of the oil stocks which form one of the principal parts of the estate. Special attention has been devoted to the matters of administration expenses generally, and, in particular, to the matter of attorneys' fees and executors' commissions, for these are considerations which are of most direct concern to the infants.

III

[fol. 13] Administration Expenses

a. In General

It will be noted in the summary on Page I of the account that the matter of administration expenses is stated separately from commissions to executors. The items of administration expenses are two, one of $5,624.39 being charged to principal and the other of $65,553.44 being charged to income.

It will be noted that the first item of $5,624.39, viz., administration expenses chargeable to principal is considerably less than one-half the corresponding item of $13,064.68 shown in the Eighth Account (pp. 1 & 17). This is due,

in the main, to the inclusion in this item in the Eighth Account of special fees and expenses connected with the journey of Mr. Maxwell, one of the executors, to Europe and his work there.

The item of $65,553.44 for administration expenses chargeable to income is about two-thirds of the corresponding item of $107,872.99 shown in the Eighth Account (pp. 1 & 18). But a reference to the latter account will show that the largeness of this item is due to the payment of a considerable amount of back Federal income taxes. A glance at the figures going to make up this total of $65,553.44 set forth on Page 18 of this account will show that it is made up practically in its entirety of payment for taxes.

The following table will show a comparison of these two items of administration expenses chargeable to principal and interest with corresponding items in previous accounts:

Comparison of Administration Expenses in Various Accounts

Account	Year ending	To principal	To income
1st	1916	$37,300	$1,339
2nd	1917	61,794	340
3rd	1917	36,206	32
4th	1918	10,964	36,659
5th	1919	6,750	30,276
6th	1920	7,295	58,641
7th	1921	5,687	56,611
8th	1922	13,064	107,872
9th	1923	5,624	65,553

In the foregoing table, it will be noted that the first figure of $5,624.39 (Fractions are omitted in the tables) is the smallest of all items of this nature occurring in the list. The latter item of $65,553, while, as explained above only about two-thirds of the corresponding figures of last year is somewhat higher than corresponding totals in previous accounting periods.

[fol. 14] b. Chargeable to Principal

On Pages 16 and 17 of this account it will be noted that the figure of $5,624.39 of administration expenses charged to principal is made up of attorneys' fees and their disbursements (hereinafter mentioned) and charges for the

administration of parts of the estate in England. The latter are in general similar to corresponding items in previous accounts and an investigation of the same indicates that they are unobjectionable.

c. Chargeable to Income

The item of $65,553.44 is, as indicated above and shown on Page 18 of this account, made up almost entirely of Federal and local District of Columbia Taxes. The reason why this item, while not containing the large number of back taxes which made the corresponding item of last year so large, is still larger than the corresponding item in the Seventh Account for 1921 (as indicated in the table above) is because of the larger payment of District of Columbia personal taxes. As against $10,065.51 paid in the Eighth Account (p. 18) there are in this account (p. 18) two payments of $11,559.93 each, totaling $23,119.86. This is due in the main to the larger income receipts in this accounting period over last $247,814.39, 9th Account, p. 1, as against $200,759.11, 8th Account, (p. 1) and to the increase in the rate on certain kinds of intangible property of 50¢ on the hundred dollars as against 30¢.

IV

Attorneys' Fees

Among the principal items going to make up the sum of $5,624.39, the total of administration expenses charged to principal, are the items of charges for services and disbursements of Messrs. McKenney & Flannery (Ninth Account, p. 17, Voucher 6) amounting to $1,323.92 and charges for the services and disbursements of Messrs. De Witt, Lockman & De Witt (Ibid, Voucher 12), amounting to $1,616.90.

The first item covers the services of the local attorneys for the calendar year 1922, being up to and including December 31st, 1922, the charge for services as distinct from disbursements being $1,250, as shown by the voucher. The extent of these services as learned by an examination of the voucher in the case, conferences with the attorneys themselves, and further information derived elsewhere by this guardian indicates that the services have comprehended conferences with the executors, conferences with the Regis-

ter of Wills, with the guardian ad litem, and others, regarding investments and re-investments in connection with the Eighth Account, and in regard to the matter of the administration of the estate generally. Additional conferences were had by the local attorneys with Messrs. Faust [fol. 15] & Wilson in connection with a bill of sale that had to do with the settlement of certain personal property which was in dispute between James McDonald, Jr., the widow of the testator, and the executors. In the opinion of this guardian, these services appear to have been as fully extensive as in previous accounts, and the charge of $1,250, the same charge made in the previous account, appears to be reasonable under the circumstances. The amount requested for disbursements in connection with this item appears also to be a proper charge.

The item of requested allowance for the services and disbursement of Messrs. De Witt, Lockman & De Witt consists of $116.90. A reference to the voucher in support of this claim, a conference with Mr. Edward De Witt of the firm mantioned, as well as an examination of the other sources of information as to the extent of the services of these New York attorneys in connection with this account will show that the services are fully as extensive in this administration year, (this bill being based on the administration year from July 11, 1922 to July 12, 1923), as in the previous accounts. The services consist of general attendance and advice given by the New York attorneys to the executors, the Fulton Trust Company in New York City, and to Mr. Lawrence Maxwell upon his visit to New York. The services of the New York attorneys also include the preparation of the Ninth account of the executors' correspondence with Messrs. McKenney & Flannery, and other items of general service. Inasmuch as the requested allowance is similar to that requested in previous accounts, and inasmuch as the work is not less extensive, it is considered reasonable under the circumstances. The requested allowance for personal expenses is also believed to be reasonable.

In this connection it is important to point out that the bills for attorney's services do not cover the services rendered in connection with the equity suit of James McDonald vs. Beulah McDonald et als., referred to above, to construe the will of the testator.

V

Executors' Commission

Two claims are made for commissions, one for commission on principal amounting to $78,596.47 (being 5% of the increase in principal of $1,571,929.32, which consists almost entirely of stock, dividends received of $1,570,325), and the sum of $12,390.72, (being 5% of the total income of $247,814.39). (These items all appear in the summaries on Page 1 of this account and also on Pages 17 and 20 thereof).

If only the rates of commission were in question in this case and the total commissions based upon that rate were approximately what they have been in precious accounts, there might be nothing in the matter of the percentage of 5% that would justify the noting of an exception by this guardian to the requested allowance for the rate allowed by this Court has been uniformly 5%. The result of com- [fol. 16] missions upon principal and income in accounts from the third to date on the basis of 5% is as follows:

Accounts	Dates	On principal	On income
3rd	1917	$200,000	None.
4th	1918	None.	$10,085
5th	1919	None	9,119
6th	1920	12,415	11,108
7th	1921	4,017	10,628
8th	1922	1,732	10,037
9th	1923	78,596	12,390

The above table shows commissions paid in connection with the accounts from the Third to the Eighth inclusive running for administration years ending in 1917 to 1922 inclusive and respectively. No commissions were claimed previous to the Third Account, the commissions there claimed relating to services that had been performed from early in 1915, including very extensive services in connection with suits to construe the will, etc.

In connection with the Third Account, in which the requested allowance was 6½% on principal, the attention of the Court is called to the fact that this guardian filed to that account exceptions to the requested allowance, and

submitted to the Court in that connection the result of his investigation of the subject matter of similar cases. A reference to the report of the guardian filed to the Third Account will show a compilation of figures of commissions allowed in large estates probated and administered in the District of Columbia. As a result of that comparison, this guardian recommended that the requested allowance of 6½% commission to the executors be denied and that in lieu thereof a commission of 2% upon the principal and income be allowed. A hearing was had upon exceptions so filed, as a result of which the Court allowed a commission of 5% upon the principal of the estate. Subsequently, the Fourth Account of the executors was filed requesting an allowance of 5% on the income to which this guardian again filed an exception, and again a hearing was had upon the same, and the exception was overruled, the requested rate of 5% upon income being allowed.

In view of the judgment so rendered by the Court after hearing on the questions in each case, this guardian in his subsequent report to the Fifth, Sixth, Seventh and Eighth Accounts made no exception to the rate of 5% as the basis of calculating commissions, inasmuch as it appeared in those accounts that the work of the executors was substantially the same in amount as rendered in connection with the Fourth Account where, as stated above, the rate of commission was fixed at 5% upon the income. So in this account if the Court were concerned only with the matter of rate of commission on income, or upon the amount of principal so that the result would be a total of commissions which would correspond roughly with the amount of commissions on principal in previous accounts, this guar-[fol. 17] dian would not feel it his duty to file an exception. But in addition to the requested allowance of 5% on income amounting to $12,390.72 the requested allowance of 5% upon the large amount of so called increase in principal would produce a total so large that this guardian deems it his duty again to call attention to a consideration which was made by him the subject matter of an exception to the Sixth Account.

The entire claim of commission on principal of $12,415.02 appearing in the Sixth Account, and referred to in the report of this guardian to the Sixth Account (Report, p. 8) was made upon a calculation of 5% on the sum of $246,-

376.69, representing the face or par value of stock dividends. To this entire item this guardian ad litem noted an exception on the ground that there was no warrant in law for making a charge for commissions on stock dividends. He urged that no case has been found justifying a commission upon stock dividends. Reference was made in the report mentioned to the case of Eisner vs. Macomber, U. S. 248, in which, in considering the nature of stock dividends for the purpose of taxation of income, the Supreme Court of the United States in holding that stock dividends are not subject to taxation as income indicated a view that they are to be considered no addition to the wealth of the stockholders. They constitute, the Court intimates, a dilution of the value of the shares originally held by the stockholders, and the Court says that to the extent that stock dividends are distributed among other stockholders the original shares of the stockholder in question become less valuable in the sense that he is entitled to less as a pro rata interest in the assets of the corporation. The Court says that in this connection (p. 254):

"The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance, and not to form he has received nothing that answers the definition of income within the meaning of the 16th Amendment."

It was also pointed out by this guardian in his report to the Sixth Account that the right to tax a commission upon stock dividends was flatly denied in the case of Davidson's Estate (1903), 204 Pa. St. 381; 54 Atl. 273.

The exception referred to in connection with the Sixth Account was submitted to this Court and argument was made thereon upon the issue as to whether or not commission could be charged upon stock dividends. The Court in allowing the commissions requested and in overruling the exceptions filed by this guardian assented to the principle, [fol. 18] but in that connection when the attention of the

Justice presiding in the Probate Court and hearing the argument at the time was called to the fact that a principle of this nature might be held to justify at some future time the allowance of a commission on stock dividends which might be abnormally large, the Justice expressly stated from the bench that he would consider that the matter of the size of the allowance would always be open. Consequently, it is believed that the question is before the Court in this instance in a double aspect, first, will the Court again assent to the principle that a commission can be allowed at all upon the large amount of stock dividends shown in this account, and secondly, if so whether or not a commission shall go as high as 5%.

The solution of the above question will in any event, it is believed, depend upon the extent of the services of the executors.

The work of the executors has involved, as before, the physical care of the securities of the estate, the same tabulations of data for the account, the checking up of accounts and most of the other work that has been mentioned in previous reports of this guardian as the usual work or administration. This account has necessitated, as has preceding accounts, work of a high order and great responsibility. Dividends and other income have been collected. The annual income tax return has been prepared, the work involving considerable detail, as also the return of the executors to the Assessor of the District of Columbia. There have been in this year of accounting, as heretofore, numerous conferences of the executors and their New York and Washington attorneys. And in addition to all the other usual matters of administration a very large burden has been cast upon the executors by the pendency of the contest over the will in the Equity suit of McDonald vs. McDonald previously referred to in this report.

Mr. Maxwell, in addition to being an executor of the estate under the terms of the will, is charged in the will with final responsibility for legal advice in connection with the estate. He has therefore, while having the aid of able counsel who will later demand compensation for their services, been charged with a considerable amount of the burden of the litigation mentioned. In addition therefore to the usual trips made by him to New York for the purpose of conference with his co-executor, The Fulton Trust Com-

pany, it appears from the vouchers in this case, and it is known to be a fact by this guardian, who personally attended the arguments in the equity suit mentioned that Mr. Maxwell was here from December 2 to 6, 1922 in connection with the hearings before Mr. Chief Justice McCoy. It is a fact also that Mr. Maxwell was in conference with his attorneys in this connection at White Sulphur Springs, West Virginia, at Baltimore, and elsewhere. And it is a fact also that this work was done by Mr. Maxwell when he was ill, and therefore with great effort.

But when all of these services are taken into consideration, it is submitted that the sum of $12,390 to be charged as a commission of 5% upon the total income received is a sufficient compensations to the executors. It [fol. 19] is submitted by this guardian ad litem in connection with this account, as in connection with the Sixth Account, that stock dividends are not a proper basis upon which to charge a commission to the executors. It is therefore respectfully submitted that the entire claim for commission on the principal of $78,596.47 should be denied. If it should seem to the Court that any sum further than $12,390 is to be allowed for commission in this account, it should be by way of an increase on the rate of commission on the income strictly speaking; but it is submitted in view of the fact that 5% has been uniformly the commission heretofore, that this percentage should not now be exceeded.

There can be no doubt that the par value of the individual stocks received as stock dividends and shown in the account (p. 4) as making up the total of $1,570,325.00 is a real value so far as the individual shares are concerned, for the market value of those shares when received in almost every case exceeds their par value. This is shown in the following table prepared by the executors:

Memorandum Showing the Par Value and the Market Value When Received of Various Stock Dividends Shown in the Ninth Account of the Executors

				Par value			Market value when received
21	shs.	National Fuel Gas Co	(Par 100)	2,100 00	@	75	1,575 00
585	"	Atlantic Refining Co	(Par 100)	58,500 00	@	120	70,200 00
16	"	Bore-Scrymser Co	(Par 100)	1,600 00	@	115	1,840 00
17	"	Cumberland Pipe Line	(Par 100)	1,700 00	@	80	1,360 00
3,075	"	Ohio Oil Co	(Par 25)	76,875 00	@	74	227,550 00
616	"	Prairie Oil & Gas Co.	(Par 100)	61,600 00	@	217	133,672 00
923	"	Prairie Pipe Line	(Par 100)	92,300 00	@	110	101,530 00
35	"	Solar Refining Co	(Par 100)	3,500 00	@	175	6,125 00
6,756	"	Standard Oil California	(Par 25)	168,900 00	@	61	412,116 00
5,130	"	" " Indiana	(Par 25)	128,250 00	@	63	323,190 00
408	"	" " Kansas	(Par 25)	10,200 00	@	46	18,768 00
452	"	" " Kentucky	(Par 25)	11,300 00	@	78	35,256 00
24,000	"	" " N. J.	(Par 25)	600,000 00	@	41	984,000 00
10,192	"	" " N. Y.	(Par 25)	254,800 00	@	49	499,408 00
120	"	" " Ohio	(Par 100)	12,000 00	@	280	33,600 00
102	"	Union Tank Car Co.	(Par 100)	10,200 00	@	82	8,364 00
3,060	"	Vacuum Oil Co	(Par 25)	76,500 00	@	47	43,820 00
Total				$1,570,325 00			$3,002,374 00

[fol. 21] Memorandum of Income Received from Investments

	Year ending July 11, 1922 (8th account)	Year ending July 12, 1923 (9th account)	Increase
Dividends from stock	$181,458.10	$221,613.73	$40,155.63
Interest on Bonds, etc	18,767.51	21,812.75	3,045.24
Total	$200,225.61	$243,426.48	$43,200.87

N. B.—The above figures include only dividends paid in cash during the last two accounting periods.

[fol. 22] The above table in its data of income at the end of this and the last accounting years shows that the issuance of stock dividends has not diminished the total income yield, the yield in this year being considerably greater than in last. Yet the fact remains that the issuance of stock dividends has constituted a dilution of the value of the various stocks so that no new value has been acquired. For example, in the table which appears later in this report of a comparison of high and low average 1922 and 1923 prices it will be noted that there is in the cases where stock dividends have been issued a corresponding dilution of prices. Thus in the case of the Atlantic Refining Company, where a 900% stock dividend was declared and consequently an increase by ten of the number of shares effected, a decrease is found to approximately one-tenth of the new high and low values on the market. The other stocks will show in the table mentioned a similar decrease.

It is submitted that the only time when the values of these stocks should figure in the calculation of commissions is when they are sold and the real increase in values is then determined.

VI

Investments

a. The Oil Stocks

The attention of the Court is called to the fact that in the approval of the Fifth Account, Mr. Chief Justice McCoy approved and passed the same "except as to investments not under order of Court." (Accts. 119 p. 399). The record in this cause will show that there has been at no time a formal passing by the Court upon the propriety of retaining the original investments, the oil stocks constituting the bulk of them. (The executors have claimed as their authority for maintaining the present investments, the specific directions of the testator in Paragraph R of his will quoted in the report of this guardian to the Sixth Account (p. 12). But, on the other hand, the general character of these investments has been called to the attention of the Court in various reports and in oral argument, and in particular in the report to the Sixth Account, and in the oral arguments in connection with the exceptions thereto, when the general

character of the investments of the estate and particularly the oil stocks was discussed. The development of these investments has been discussed in previous reports.

1st. Market Prices of Oil Stocks

In the report to the Fifth Account, it was shown by Exhibit "A" thereto that the value of these oil stocks by comparison between the inventory value and the price on April 28, 1919, had increased by $1,982,529.13. The report to the Sixth Account contains, in Exhibit "A" a tabulation of high and low prices of these stocks for the months immediately prior to September, 1920, in comparison with the prices in [fol. 23] 1919. As pointed out in that report the prices in 1920, tended to be lower than in 1919, but the prices even at the lowest were not below the low figures that prevailed between the original inventory of this stock in 1915 and the point of time selected in 1920.

In the Exhibit "A" attached to the report to the Seventh Account, a summary was presented of the holdings of oil stocks in which it appeared that for that year, namely, 1921, there had been a further fall in the high and low values of the stocks in question in the months just prior to September, 1921, as against the figures for the similar period in 1920. The difference was more pronounced in the case of high prices, however, the low prices being fairly consistent. The fall was attributable to abnormal economic conditions succeeding the era of the world war which had a reflection on the petroleum industry. Thus, in 1920, the period of high prices in that industry reached a climax, the industry experiencing an unprecedented prosperity. This was followed, during 1921 by a sharp reaction. This had an effect, of course, upon the price of the stock.

In the report of this guardian to the Eighth Account at Page 24 of said report is produced a table in which there is displayed the number of shares of the various Standard Oil Stocks held by this estate, and the history of the high and low market prices from the years 1912 to 1922 inclusive. The tabulation of high and low prices in connection with these stocks in the table referred to will show a marked increase in prices from 1913 up to the prices prevailing in 1920 when, for example, the Standard Oil Stock had risen in high and low prices from 448 and 315 respectively to 910

and 572 respectively. A comparison of the high and low prices in that table for the years 1920 and 1921 will show the fall that has been referred to above, particularly in the high prices. But the same table will show a marked change in the year 1922 over the year 1921, the level of high and low prices in 1922 being generally better than the level in 1921.

An effort has been made to bring this calculation of high and low prices in the stock in question down to the present year in a table which follows, showing the difference in high and low prices between the general average for 1922 shown and those averages for 1923. An asterisk before the name of the particular stock indicates that the issuance of a stock dividend in this accounting year and the increase thereby of the number of shares of stock has produced a decrease in the market value of the stock. In a few instances indicated by an apostrophe a similar reduction in the market value of the stock is due to a reduction in the par value. A proper comparison of the prices as between 1922 and 1923 must, of course, take into account this change in the number of shares representing the issuance of stock in the particular company as reflected in a changed market price.

[fol. 24] Comparison of Average High and Low Market Quotations for the Year on Oil Stocks as Shown by August, 1923, Edition of the Investors' Pocket Manual, Crane, Parris and Company

(Explanatory note precedes this table)

Name of stock	No. of shares	1922 High	1922 Low	1923 High	1923 Low
Anglo-American Oil Co. Ltd	3,634	25	16	19	13
Atlantic Refining Co. Com	65	1,575	900	...	...
* " " " "	650	...	...	160	100
" " " Pfd	260	120	113	121	102
Borne-Schrysmer Company	4	615	120	...	...
* " " "	20	...	...	153	107
Buckeye Pipe Line	342	110	82	94	80
Chesebrough Mfg. Company Com	13	205	117	240	205
" " " Pfd	9	113	104	118	109
Continental Oil Company	170	154	123	...	...
" " "	680	...	...	50	34
Crescent Pipe Line Co	103	49	28	47	15
Cumberland Pipe Line Co	17	185	115	168	80
Eureka Pipe Line Co	85	104	78	117	95
Galena Signal Oil Pfd	29	114	104	117	103
" " " "	34	114	104	117	103
" " " Com	144	62	39	79	55
Indiana Pipe Line Co	171	112	82	103	92

National Transit Company	869	31	23	29	22
New York " "	85	210	117	138	97
Ohio Oil Company	1,025	365	71	...	...
* " " "	4,100	...	...	85	48
Prairie Oil and Gas Company	308	756	205	700	...
* " " " " "	924	...	...	...	170

[fol. 25]

Solar Refining Company	935	425	330	...	...
* " " "	70	...	...	212	170
Southern Pipe Line Company	171	110	75	116	92
South Penn Oil Company	340	249	143	196	100
S. W. Penna. Pipe Line Co.	60	98	50	96	65
Standard Oil Co. California	6,756	135	91	123	121
* " " " "	15,201	63	55	61	47
" " " Indiana	5,130	135	58	...	...
* " " " "	10,260	...	...	69	49
" " " Kansas	34	710	500	...	...
* " " " "	'544*	'46*	'41*	'57*	'37*
" " " Kentucky	680	129	72	133	75
* " " " "	1,133	129	72	133	75
" " " Nebraska	51	225	160	285	183
" " " New Jersey	1,500	250	...	...	...
* " " " " "	30,000*	...	...	'44*	'30*
" " " " " Pfd	1,678	120	113	118	115

Comparison of Average High and Low Market Quotations—Continued

Name of stock	No. of shares	1922 High	1922 Low	1923 High	1923 Low
Standard Oil Co. York	1,274	675	341	...	...
* " " " " "	15,288*	'60*	'37*	'49*	'34*
" " " Ohio	120	595	260	...	...
* " " " "	240	...	...	317	270
" " " "	120	120	113	119	115
" " " " 7% Pfd	15	43	24	39	21
Swan & Finch Co	205	122	85	99	81
Union Tank Car Co	307	122	85	99	81
* " " " "	205	113	102	112	106
" " " "	255	710	298	...	...
" " " " Pfd	4,080	...	...	55	40
Vacuum Oil Co	12	37	20	30	22
* " " "					
Washington Oil Co					

[fol. 26] In those shares shown in the foregoing table in which prices have not been affected by either a change in par value or the declaration of a stock dividend, the rises and falls are slight, with a few exceptions. In those cases, however, where stock has been diluted, either by declaration of stock dividends or by decrease in par value of stock, the value of an individual share of new stock when multiplied by the number of new units equals approximately the 1923 prices. The prices are in general even in those cases where the 1923 value is below that of 1922, higher than in the period of low prices referred to in 1921, though the prices are generally below the high range of prices prevailing in 1920. The prices of course continue to be way above those of 1915 as shown in the original inventory in this case and in the report to the Eighth Account.

2nd. Dividends on Oil Stocks

Looking now at the income on the oil stocks the variable element is, of course, the dividends on the common stocks. (The preferred stocks always yielding the maximum dividends.) The following table is a comparison of the income received in the Ninth, 1923 Account over the Eighth, 1922 Account:

[fol. 27] Income Receipts—Comparison Between 8th (1922) and 9th (1923) Accounts

Name of stock	1922—8th account: No. of shares	Per share	Total	1923—9th account: No. of shares	Per share	Total
Anglo-Am. Ltd	3,634	.57		3,634	.45	
		.21	$2,834.52		.23¼	
					.46½	$4,170.01
Atlantic Refining Com.	65	4 @ 5.00	1,300.00	65	2 @ 5.00	
				650	2 @ 1.00	1,950.00
Atlantic Refining Pfd	260	4 @ 1.75	1,820.00	260	4 @ 1.75	1,820.00
Borne Scrymser	4	20.00				
		15.00	140.00	4	20.00	
				20	5.00	180.00
Buckeye Pipe	342	4 @ 2.00	2,736.00	342	2.00	
					4.00	
					Extra 50%	
					1.75	11,799.00
Chesborough Com	13	3 @ 3.50	136.50	13	4 @ 3.50	182.00
Chesborough Pfd	9	4 @ 1.75	63.00	9	4 @ 1.75	63.00
Continental	170	4 @ 2.00	1,360.00	170	2 @ 2.00	
				680	2 @ .50	1,360.00
Crescent P. L	103	4 @ .75	309.00	103	2 @ .75	
					2 @ .37½	231.74

Cumberland Pipe Line	17	12 00	204 00	17	12 00	204 00
Eureka Pipe L	85	4 @ 2 00	680 00	85	2 @ 2 00	
[fol. 28]					2 @ 3 00	850 00
Galena Pfd	29	4 @ 2 00	232 00	29	4 @ 2 00	232 00
" "	34	4 @ 2 00	272 00	34	4 @ 2 00	272 00
Galena Pfd. Com	144	No.		144	3 @ 1 00	432 00
Indiana Pipe Line	171	3 @ 2 00		171	4 @ 2 00	
		4 00	1,710 00		Extra 40%	4,788 00
National Transit	869	2 @ 1 00		869	25	
		2 @ 50	2,607 00		3 @ 50	1,520 75
New York Transit	85	4 @ 4 00	1,360 00	85	2 @ 4 00	
					Extra 80 00	
					2 @ 3 00	7,990 00
Ohio Oil Co	1,025	1 25		1,025	2 00	
		2 @ 3 00			2 @ 3 00	
		2 00	9,481 25	4,100	75	11,275 00
Prairie Oil	308	2 @ 5 00		308	2 @ 5 00	
		7 00		924	2 @ 2 00	6,776 00
		6 00	7,084 00			
Solar Refining Co	35	2 @ 5 00	350 00	35	10 00	
				70	5 00	700 00
South Pipe L	171	4 @ 2 00	1,368 00	171	3 @ 2 00	
					4 00	1,710 00
So. Penn. Oil	340	2 @ 3 00		340	1 50	511 20
		2 @ 1 50	3,067 20			

Income Receipts—Continued.

Name of stock	1922—8th account: No. of shares	1922—8th account: Per share	1922—8th account: Total	1923—9th account: No. of shares	1923—9th account: Per share	1923—9th account: Total
S. W. Pa. Pipe Line	60	4 @ 1.00	240.00	60	1.00	
					4.00	
[fol. 29]					2 @ 2.00	540.00
Stand. Cal	6,756	4 @ 1.00	27,024.00	6,756	2 @ 1.00	
				13,512	.50	
				15,201	.50	27,868.50
Stand. Ind	5,130	4 @ 1.00	20,520.00	5,130	2 @ 1.00	
				10,260	2 @ .62½	23,085.00
Stand. Kan	34	2 @ 6.00		34	3.00	
		2 @ 3.00	612.00		6.00	
				544	2 @ .50	850.00
Stand. Ky	102	3 @ 3.00		680	1.25	
	680	1.00	1,598.00		6.25	
				1,133 1/3	2 @ 1.00	7,366.67
Stand. Neb	51	2 @ 5.00	510.00	51	15.00	
					5.00	1,020
Stand. N. J. Com	1,500	4 @ 5.00	30,000.00	1,500	2 @ 5.00	
				30,000	2 @ .25	30,000.00
Stand. N. J. Pfd	1,678	4 @ 1.75	11,746.00	1,678	4 @ 1.75	11,746.00

Stand. of N. Y.	1,274	4 @ 4.00	20,384.00	1,274	2 @ 4.00	
				15,288	2 @ .35	20,893.60
Stand. Ohio	120	4 @ 4.00	1,920.00	120	2 @ 4.00	
				240	2 @ 2.50	2,160.00
Stand. Ohio 7% Pfd	120	4 @ 1.75	840.00	120	4 @ 1.75	840.00
Swan & Finch	15	None.			None.	
Union Tank Com. 7% Pfd	205	4 @ 1.75	1,435.00	205	4 @ 1.75	1,435.00
Vacuum Oil	255	5.00		255	10.00	
		3.00	2,805.00	4,080	1.00	6,630.00
Wash. Oil	12	None.			None.	

[fol. 30] The individual income received on the various oil stocks are generally the same in this accounting period in comparison with the last accounting period for the corresponding time of the year. In some cases it will be noted that the income for various instalments in regard to various stocks is larger than the income of last year while in others it is smaller. The increases are noted by a plus sign preceding the figures in the 1923 column, and the decreases are noted by a minus sign preceding the figures in that column. The number of extra dividends which occur are indicated by the letter 'e' preceding the particular dividends in the column referred to. But on account of the large number of stock dividends received and the consequent larger basis for calculating dividends the grand total of dividend receipts, apart from the large receipts of stock dividends, is, as already pointed out, very much greater in this accounting period than in the preceding, being $243,426.48 this year as against $200,275.10 last year.

It will thus be seen that there has been a complete recovery so far as dividend receipts are concerned which has more than kept pace with the increase in the prices of these oil stocks. During the depression of dividends pointed out in the Sixth report. (p. 29) prices of the stocks held their own. Now that there has been a large increase in the dividends yielded by the stock, there has not been a commensurate rise in the market price of the stocks themselves. This has been due in a measure to the large prices prevailing in the stock, and it was for this reason apparently that the companies concerned have seen fit to dilute the stock either by stock dividends or by decrease in par value. This will no doubt be followed by a rise in the market value of the new stock.

3rd. Question of Retention of Oil Stocks

It was stated by this guardian, in the report to the Fifth Account (v. p. 14), that because the principal of the estate has been so greatly enhanced in value by means of the retention of this stock, because of the large income derived therefrom, and in view of the direction of the will, it had not seemed to this guardian that any duty devol-ed upon him to require a reconversion of these securities. This seemed especially true at the time of the report to the Sixth

Account, inasmuch as an examination of that account showed that the executors *has* followed a policy of gradual retirement and reconversion that would ultimately bring the estate down to a more conservative and permanent basis. There was pointed out, however, in the report to the Seventh Account (v. p. 12) that a difficulty had arisen in the way of this form of retirement because of the method of taxation. It was then pointed out that the executors must be governed in their policy towards the disposition of existing investments by the preponderance respectively of a favorable price on the one hand and the burdensome tax laws on the other. This guardian has been unable to discover, under the circumstances outlined, any better method to pursue. For this reason, he has not felt that any duty devolved upon him to except to the present method, espe- [fol. 31] cially in view of the fact that the whole question of investments has been previously brought to the attention of this Court in the manner stated above.

b. The Other Investments

The income received by the executors from bonds required by them as parts of the original investments is identical with that received in the last account. The market prices remain fairly constant.

New investments of income are shown on Page 20 of this account. They amount to $122,218.25, invested in bonds of the City of New York and shares of stock of the Standard Oil Company of California.

As to new investments, it has not been the practice of the executors to obtain orders of Court in advance. As they are still in this Court as executors, it is submitted that they are subject to the provisions of the Code (Secs. 123, 369, etc.) governing investments by decedents' estates and Probate Rule 19 requiring the approval of the Court in advance. Yet the investments are to the extent of two-thirds of the sum mentioned within the class of investments sanctioned by Probate Rule 19, and as to the other third are in a security in which the estate is already heavily interested. Thus this guardian has not felt it his duty to note an exception to these investments, although he reverses to himself on behalf of the infants represented the right to object in any

future accounting to any new investments not sanctioned by the Court.

Wherefore, the premises considered, this guardian:

1. Excepts to the requested allowance of $78,596.47 for commission on principal noted on Pages 1 and 17 of this account and recommends that the same be entirely disallowed.

2. Recommends that, with the adjustment proper to be made if the above exception is allowed, the account be in other respects approved.

Charles V. Imlay, Guardian ad Litem.

Duly sworn to by Charles V. Imlay. Jurat omitted in printing.

[fol. 32] [File endorsement omitted.]

In Supreme Court of the District of Columbia, Holding Probate Court

Administration. No. 21417

Exceptions of James McDonald, Jr., to Executors' Ninth Account—Filed in Probate Court November 24, 1923

Now comes James McDonald, Jr., and excepts to the 9th account of Lawrence Maxwell and Fulton Trust Company of New York, executors, filed herein, in the manner and for the reasons following, towit:

He excepts to the allowances claimed by said executors for commissions on principal and income, as set out in said account, for the following reasons, among others:

(a) That said Lawrence Maxwell and Fulton Trust Company of New York pretend to be acting as executors under the last will and testament of James McDonald, deceased, when, as a matter of fact, all of the duties as executors named in said will have been or should have been long since fully performed and completed, and when in fact and in law the said Lawrence Maxwell and Fulton Trust Company of

New York, if they have any legal right to manage said estate, acquired such right under the alleged trust provision contained in the will of said James McDonald, deceased, but which trust provision this exceptant avers is null and void because it violates the rule against perpetuities and restraint on alienation, as more fully appears from his Bill of Complaint filed on the Equity side of this court against said executors and others, the same being Equity Cause No. 40,082.

(b) Because the said Lawrence Maxwell and Fulton Trust Company of New York have no authority in law or under the provisions of the will of said deceased to retain in their possession and accumulate the net income derived from said estate, and upon which commissions are now claimed by them as executors.

(c) Because the commissions claimed, in large part, are based upon an alleged increase in the capital assets of said estate, said increase consisting in the issuance to said estate, as the holder of stock in a large number of corporations, of stock dividends, when as a matter of law and of fact, the issuance of said stock dividends added nothing to the interest of said estate as a share holder in said corporations, but merely changed the evidence of said interest, in the shape of stock certificates.

(d) Because the issuance of stock dividends to said estate cannot be considered as an increase of either capital or income.

[fol. 33] (e) Because in view of the allowance of commissions to said executors in their former accounts, the claim of commissions in the 9th account, both on principal and income, is grossly excessive.

Hamilton & Hamilton, Allison, Lynch & Phillips, Attorneys for James McDonald, Jr.

[File endorsement omitted.]

NINTH ACCOUNT OF EXECUTORS—Filed in Probate Court August 20, 1923

Ninth and Final Account of Lawrence Maxwell and Fulton Trust Company of New York, Executors, Including Special Account of $50,000 Legacy to James McDonald, Jr.

Date of death: January 13, 1915.
Letters issued January 22, 1915.

Accounts from July 11, 1922, to July 12, 1923

Principal: Summary Statement of Accounts

Balance as per Eighth Account		$2,467,073 92
Profit on inventoried items	1,604 32	
Stock dividend	1,570,325 00	
		1,571,929 32
		$4,039,003 24
Administration expenses charged to principal	5,624 39	
Commissions on Principal	78,596 47	
		84,220 86
Balance of Principal		$3,954,782 38

Income:

Balance as per Eighth Account		808,685 75	
Received since	243,426 48		
Profit on sale of asset	4,387 91		
		247,814 39	
		1,056,500 14	
[fol. 35] Administration expenses charged to Income	65,553 44		
Annuities paid	30,700 00		
Commissions to Executors	12,390 72		
		108,644 16	
Balance of Income			947,855 98
Aggregate balance of principal and income			$4,902,638 36

Special Account

Principal: Legacy of $50,000 to James McDonald, Jr.

Balance as per last account			$49,935.00
Income:			
Balance per last account		169.83	
Received since		2,115.34	
		$2,285.17	
Paid James McDonald	$2,040.00		
Commissions to Executors	105.76		
		2,145.76	
Balance of Income			139.41
Aggregate balance of principal and income			$50,074.41

Dated, July 12, 1923.

Receipts

I

Principal Account

These Accountants charge themselves with the following property of said decedent which has come into their possession as Executors as follows:

1922.			
July 11.	Balance of principal in hands of Executors as shown by the Executors' Eighth Account, viz:		$2,467,073 92
	These accountants also charge themselves with profit if any on proceeds of inventoried items:		
1923.			
Feb. 5.	Received from Arthur E. Nicholls, English Administrator, proceeds sale of £300 Golf Club & Country House for £225 at 4 65 1/32 or	1,046 32	
	Inventoried as Nominal	0	
	Profit		1,046 32
Mch. 21.	Received payment of $25 per share on 103 shares Crescent Pipe Line Co. on reduction of par value from $50 to $25 per share	2,575 00	

Original shares inventoried at	4,120 00			
Value of one half		2,060 00		
Profit				515 00

[fol. 37] These accountants also charge themselves with proceeds of stock dividend:

1922.				
Dec. 29.	Received from Union Tank Car Co. in payment for ½ share received as part of stock dividend of 50% on 205 shares common stock		43 00	
These accountants also charge themselves with stock received as dividends by the Executors at the par or face value thereof, viz:				
	Forward		$1,604.32	$2,467,073.92
	Forward		$1,604.32	$2,467,073.92
Dec. 1922.	21 shares National Fuel Gas Co. par $100	2,100.00		
do.	585 " Atlantic Refining Co. par 100	58,500.00		
do.	16 " Borne-Serymser Co. par 100	1,600 00		
Jan. 1923.	17 " Cumberland Pipe Line Co. par 100	1,700.00		
do.	3,075 " Ohio Oil Co. par 25	76,875.00		
do.	616 " Prairie Oil & Gas Co. par 100	61,600.00		
do.	923 " Prairie Pipe Line par 100	92,300.00		

do.	35	"	Solar Refining Co. par 100.....	3,500.00		
Dec. 1922.	6,756	"	Standard Oil Co. California par 25.	168,900.00		
Jan. 1923.	5,130	"	Standard Oil Co. Indiana par 25..	128,250.00		
do.	408	"	Standard Oil Co. Kansas, par 25..	10,200.00		
Dec. 1922.	452	"	Standard Oil Co. Kentucky par 25.	11,300.00		
do.	24,000	"	Standard Oil Co. New Jersey par 25	600,000.00		
do.	10,192	"	Standard Oil Co. New York par 25.	254,800.00		
do.	120	"	Standard Oil Co. Ohio par 100...	12,000.00		
do.	102	"	Union Tank Car Co. par 100...	10,200.00		
Jan. 1923.	3,060	"	Vacuum Oil Co. par 25.....	76,550.00		
					1,570,325.00	1,571,929.32
						$4,039,003.24

[fol.38]

Income Account

These Accountants charge themselves with the following Income received on the property owned by the Estate:

1922			
July 11.	Balance on hand as shown by Executors' Eighth Account..	808,685.75	
	Forward	$808,685.75	$4,039,003.24

Receipts—Continued

Forward		$808,685.75	$4,039,003.24
Dividends on Stock.			
3,634 shares Anglo-American Oil Co., Ltd. English:			
1922			
July 15. Divd. of .45 per sh.	$1,635.30		
1923			
Jan. 15. " " .23¼ " "	844.90		
May 15. " " .46½ " "	1,689.81		
[fol. 39]	4,170.01		
Atlantic Refining Co. Com.:			
1922.			
Sep. 16. Divd. of $5 per sh. on 65 shs.	$325.00		
Dec. 15. " " $5 do.	325.00		
1923.			
Mch. 16. " " $1 per sh. on 650 shs.	650.00		
June 19. " " $1 do.	650.00		
		1,950.00	
260 shs. Atlantic Refining Co. Pfd.:			
1922.			
Aug. 1. Divd. of $1.75 per sh.	$455.00		
Nov. 1. " " " " "	455.00		

1923.

Feb.	1.	"	"	"	"	"	.....	455.00	
May	1.	"	"	"	"	"	.....	455.00	
									1,820.00

Borne-Scrymser Co.:

1922.

Oct.	16.	Divd. of $20 per sh. on 4 shs.					.....	$80.00	

1923.

Apl.	16.	"	"	5 per sh. on 20 shs.			.....	100.00	
									180.00

[fol. 40] 342 shs. Buckeye Pipe Line Co.:

1922.

Sep.	15.	Divd. of $2	per sh.				.....	$684.00	
Dec.	15.	"	" $4	"	"		.....	1,368.00	
"	30.	Ex. "	" 50%	"	"		.....	8,550.00	

1923.

Mch.	15.	Divd. "	$1.75	"	"		.....	598.50	
June	15.	"	" 1.75	"	"		.....	598.50	
									11,799.00

Receipts—Continued

	13 shs. Chesebrough Mfg. Co. Com.:				
1922.					
Sep. 30.	Divd. of $3.50 per sh.	$45.50			
Dec. 28.	" " $3.50 " "	45.50			
1923.					
Mch. 31.	" " $3.50 " "	45.50			
June 30.	" " $3.50 " "	45.50			
			182.00		
	Forward		$20,101.01	$808,685.75	$4,039,003.24
[fol. 41]	Forward		$20,101.01	$808,685.75	$4,039,003.24
	9 shs. Chesebrough Mfg. Co. Pfd.:				
1922.					
Sep. 30.	Divd. of $1.75 per sh.	$15.75			
Dec. 28.	" " 1.75 " "	15.75			
1923.					
Mch. 31.	" " 1.75 " "	15.75			
June 30.	" " 1.75 " "	15.75			
			63.00		

Continental Oil Co.:

1922.

Sep. 18.	Divd. of $2 per sh. on 170 shs.		$340.00	
Dec. 18.	" " $2 dop.		340.00	
1923.				
Mch. 19.	" " 50¢ per sh. on 680 shs.		340.00	
June 18.	" " 50¢ do.		340.00	
				1,360.00

103 shs. Crescent Pipe Line Co.:

1922.

Sep. 15.	Divd. of 75¢ per sh.	$77.25	
1923.			
Jan. 3.	" " 75¢ " "	77.25	
Mch. 15.	" " 37½¢ " "	38.62	
June 15.	" " 37½¢ " "	38.62	
			231.74

[fol. 42] 17 shs. Cumberland Pipe Line Co.:

1922.

Dec. 15.	Divd. of $12.00 per sh.	.....	204.00

85 shs. Eureka Pipe Line Co.:

1922.				
Aug.	1.	Divd. of $2 per sh.	$170 00	
Nov.	1.	" " $2 " "	170 00	
1923.				
Feb.	1.	" " $3 " "	255 00	
May	1.	" " $3 " "	255 00	
				850 00

29 shs. Galena Signal Oil Co. Pfd.:

1922.				
Oct.	2.	Divd. of $2 per sh.	$58 00	
1923.				
Jan.	2.	" " $2 " "	58 00	
Mch.	31.	" " $2 " "	58 00	
June	30.	" " $2 " "	58 00	
				232 00

	34 3/5 addl. sh. Galena Signal Oil Co. Pfd.:				
1922.					
Oct. 2.	Dividend of $2 per share on 34 shs. (no frac.)	$68 00			
	Forward	$68 00	$23,041 75	$808,685 75	$4,039,003 24
[fol. 43]	Forward	$68 00	$23,041 75	$808,685 75	$4,039,003 24
1923.					
Jan. 3.	Divd. of $2 per sh. on 34 shs. (no frac.)	68 00			
Mch. 31.	Divd. of $2 per sh. on 34 shs. (no frac.)	68 00			
June 30.	Divd. of $2 per sh. on 34 shs. (no frac.)	68 00			
			272 00		
	144 shs. Galena Signal Oil Co. Com.:				
1923.					
Jan. 2.	Divd. of $1 per sh	$144 00			
Mch. 31.	" " $1 " "	144 00			
June 30.	" " $1 " "	144 00			
			432 00		

Receipts—Continued

1922.	171 shs. Indiana Pipe Line Co.:		
Aug. 15.	Divd. of $2 per sh	$342.00	
Nov. 15.	" " $2 " "	342.00	
Dec. 30.	Ex. Divd. of 40% per sh	3,420.00	
1923.			
Feb. 15.	Divd. of $2 per sh	342.00	
May 15.	" " $2 " "	342.00	
			4,788.00
1922.	869 shs. National Transit Co.:		
Sep. 15.	Divd. of 25¢ per sh	$217.25	
Dec. 15.	" " 50¢ " "	434.50	
1923.			
Mch. 15.	" " 50¢ " "	434.50	
June 15.	" " 50¢ " "	434.50	
			1,520.75
[fol. 44]	85 shs. New York Transit Co.:		
1922.			
July 15.	Divd. of $4 per sh	340.00	
Oct. 14.	" " $4 " "	340.00	
Dec. 30.	Ex. " of $80 per share	6,800.00	

1923.					
Jan. 15.	Divd. of $3 per sh	255.00			
Apl. 14.	" " $3 " "	255.00			
			7,990.00		
1922.	Ohio Oil Co.:				
Oct. 2.	Divd. of $2 per sh. on 1,025 shs	$2,050.00			
1923.					
Jan. 2.	" " $3 "	3,075.00			
Apl. 2.	" " $3 "	3,075.00			
July 2.	" " 75¢ per sh. on 4,100 shs	3,075.00			
			11,275.00		
	Forward		$49,319.50	$808,865.75	$4,039,003.24
	Forward		$49,319.50	$808,865.75	$4,039,003.24
1922.	Prairie Oil & Gas Co.:				
Aug. 1.	Divd. of $5 per sh. on 308 shs	$1,540.00			
Oct. 31.	" " $5 "	1,540.00			
1923.					
Feb. 1.	" " $2 per sh. on 924 shs	1,848.00			
Apl. 30.	" " $2 per sh	1,848.00			
			6,776.00		

Receipts—Continued

[fol. 45] Solar Refining Co.:

1922.			
Dec. 19.	Divd. of $10 per sh. on 35 shs	$350 00	
1923.			
June 20.	" " $5 per sh. on 70 shs	350 00	
			700 00

171 shs. Southern Pipe Line Co.:

1922.			
Sep. 1.	Divd. of $2 per sh	342 00	
Dec. 1.	" " $2 " "	342 00	
1923.			
Mch. 1.	" " $4 " "	684 00	
June 1.	" " $4 " "	342 00	
			1,710 00

340 & frac. South Penn. Oil Co.:

1922.			
Sep. 30.	Divd. of $1.50 per sh	$511 20	511 20

		60 shs. Southwest Penna. Pipe Line Co.:			
1922.					
Oct. 3.	Divd. of $1 per sh		$60 00		
Dec. 30.	" " $4 " "		240 00		
1923.					
Apl. 2.	" " $2 " "		120 00		
July 2.	" " $2 " "		120 00		
				540 00	
[fol. 46]		Standard Oil Co. of California:			
1922.					
Sep. 19.	Divd. of $1 per sh. on 6,756 shs		$6,756 00		
Dec. 19.	" " $1 "		6,756 00		
1923.					
Mch. 19.	" " 50¢ per sh. on 13,512 shs		6,756 00		
June 19.	" " 50¢ per sh. on 15,201 shs		7,600 50		
				27,868 50	
		Forward		$87,425 20	$808,685 75 $4,039,003 24

Receipts—Continued

	Forward		$87,425.20	$808,685.75	$4,039,003.24
	Standard Oil Co. of Indiana:				
1922.					
Sep. 15.	Divd. of $1 per sh. on 5,130 shs	$5,130.00			
Dec. 15.	" " $1 "	5,130.00			
1923.					
Mch. 15.	" " 62½¢ per sh. on 10,260 shs.	6,412.50			
June 15.	" " 62½¢ per sh. on 10,260 shs.	6,412.50			
			23,085.00		
	Standard Oil Co. of Kansas:				
1922.					
Sep. 18.	Divd. of $3 per sh. on 34 shs	102.00			
Dec. 18.	" " $6 "	204.00			
1923.					
Mch. 19.	" " 50¢ per sh. on 544 shs	272.00			
June 18.	" " 50¢ "	272.00			
			850.00		

[fol. 47] 1922.		Standard Oil Company of Kentucky:			
Oct. 2.	Divd. of $1.25 per sh. on 680 shs.		$850.00		
Jan. 2.	" " $6.25 "		4,250.00		
Apl. 1.	" " $1 per sh. on 1,133 1/3 shs.		1,133.34		
July 1.	" " $1 "		1,133.33		
				7,366.67	
1922.		51 shs. Standard Oil Co. of Nebraska:			
Dec. 23.	Divd. of $15 per sh.		$765.00		
1923.					
June 23.	" " $5 " "		255.00		
				1,020.00	
1922.		Standard Oil Co. of New Jersey Com.:			
Sep. 15.	Divd. of $5 per sh. on 1,500 shs.		7,500.00		
Dec. 15.	" " $5 "		7,500.00		
1923.					
Mch. 15.	" " 25¢ per sh. on 30,000 shs.		7,500.00		
June 15.	" " 25¢ "		7,500.00		
				30,000.00	
	Forward			$149,746.87	$808,685.75	$4,039,003.24

[fol. 48]	Forward	$149,746.87	$808,685.75	$4,039,003.24
	1,678 shs. Standard Oil Co. of New Jersey, Pfd.			
1922.				
Sep. 15.	Divd. of $1.75 per sh.	$2,936.50		
Dec. 15.	" " 1.75 " "	2,936.50		
1923.				
Mch. 15.	" " 1.75 " "	2,936.50		
June 15.	" " 1.75 " "	2,936.50		
			11,746.00	
	Standard Oil Co. of New York:			
1922.				
Sep. 15.	Divd. of $4.00 per sh. on 1,274 shs.	5,096.00		
Dec. 15.	" " 4 per sh	5,096.00		
1923.				
Mch. 15.	" " 35¢ per sh. on 15,288 shs.	5,350.80		
June 15.	" " 35¢ 15,288 shs.	5,350.80		
			20,893.60	

Standard Oil Co. of Ohio:

1922.

Oct.	2.	Divd. of $4 per sh. on 120 shs.....	$480.00	
1923.				
Jan.	2.	" " $4.00 per sh. on 120 shs.....	480.00	
Apl.	1.	" " $2.50 per sh. on 240 shs.....	600.00	
July	2.	" " $2.50 "	600.00	
				2,160.00

[fol. 49] 120 shs. Standard Oil Co. of Ohio 7% Pfd. Stock:

1922.

Sep.	1.	Divd. of $1.75 per sh.....	$210.00	
Dec.	1.	" " 1.75 " "	210.00	
1923.				
Mch.	1.	" " 1.75 " "	210.00	
June	1.	" " 1.75 " "	210.00	
				840.00

15 shs. Swan & Finch Co.:

No dividend.

Union Tank Car Co.:

1922.

Sep. 1.	Divd. of $1.75 per sh. on 205 shs.		358.75		
Dec. 1.	" " 1.75 "		358.75		
1923.					
Mch. 1.	" " 1.25 per sh. on 307 shs.		383.75		
June 1.	" " 1.25 "		383.75		
				1,485.00	
	Forward			$186,871.47	$808,685.75	$4,039,003.24
[fol. 50]	Forward			$186,871.47	$808,685.75	$4,039,003.24

205 shs. Union Tank Line Co. 7% Pfd.:

1922.

Sep. 1.	Divd. of $1.75 per sh.	$358.75	
Dec. 1.	" " 1.75 " "	358.75	

1923.

Mch. 1.	" " 1.75 " "	358.75	
June 1.	" " 1.75 " "	358.75	
			1,435.00

Vacuum Oil Co.:

1922.

Nov. 29.	Divd. of $10 per sh. on 255 shs.....	2,550.00	

1923.

June 20.	" " $1 per sh. on 4,080 shs.....	4,080.00	
			6,630.00

12 shs. Washington Oil Co.:

No dividend.

750 shs. National Lead Co. Pfd.:

1922.

Sep. 16.	Divd. of $1.75 per sh.....	$1,312.50	
Dec. 15.	" " 1.75 " "	1,312.50	

1923.

Mch. 15.	" " 1.75 " "	1,312.50	
June 15.	" " 1.75 " "	1,312.50	
			5,250.00

Receipts—Continued

[fol. 51] 100 shs. Fulton Trust Co.:

1923.

Jan. 2.	Divd. of 7% per share	700.00		
July 2.	" " 5% " "	500.00		
			1,200.00	

National Fuel Gas Co.:

1922.

July 15.	Divd. of $2.50 per sh. on 21 shs.	$52.50		
Oct. 16.	" " $2.50 "	52.50		

1923.

Jan. 15.	" " 2.50 "	52.50		
Apl. 16.	" " $1.25 " 42 shs.	52.50		
			210.00	

100 shs. New York, New Haven & Hartford R. R. Co.:
No dividends received.

Forward	$201,596.47	$808,685.75	$4,039,003.24

		Forward		$201,596.47	$808,685.75 $4,039,003.24
		34 shs. Kuhne-Libby Co. Pfd.:			
	1922.				
July	19.	Divd. of $1.50 per sh.	$51.00		
Oct.	13.	" " $1.50 " "	51.00		
	1923.				
Jan.	24.	" " $1.50 " "	51.00		
Apl.	18.	" " $1.50 " "	51.00		
				204.00	
[fol. 52]		100 shs. National Bank of Commerce:			
	1922.				
Oct.	2.	Divd. of 3%	$300.00		
	1923.				
Jan.	2.	" " 7%	700.00		
Apl.	2.	" " 3%	300.00		
July	2.	" " 3%	300.00		
				1,600.00	

Receipts—Continued

	12,000 shs. Castle Creek Mng. Co.:		
	13,000 shs. Castle Creek Mng. Co.:		
	No dividends received.		
	100 shs. American Register Ltd. Pref.:		
	No dividends received.		
	2 shs. Royal Automobile Club Bldgs. Co. 7 s. o. d. at 4.65 1/32		1 60
	100 shs. English American Shipping Co. Ltd.		0
	503 & frac. shs. Illinois Pipe Line Co.:		
1923.			
Jan. 2.	Divd. of $8.00 per sh.	$4,029 33	
1923.			
June 30.	" " 8.00 " "	4,029 33	
			8,058 66

[fol. 53] Prairie Pipe Line Co.:

1922.					
Aug. 1.	Divd. of $5.00 per sh. on 461 + shs.		$2,307.50		
Nov. 2.	" " $5.00 "		2,307.50		
1923.					
Feb. 1.	" " $2.00 per sh. on 1,384½ shs.		2,769.00		
May 1.	" " $3 "		2,769.00		
				10,153.00	
	Forward			$221,613.73	$808,685.75	$4,039,003.24
	Forward			$221,613.73	$808,685.75	$4,039,003.24

Interest on Bonds.

Union Pacific R. R. Co. Bonds
$10,000 4% First Mtg. due
1947, Int. January & July:

1923.				
Jan. 2.	6 mos.' int. to Jan. 1, 1923		$200	
July 2.	" " " " July 1, 1923		200	
				400.00

Receipts—Continued

Atchison Topeka & Santa Fe Ry. Co. Bonds $10,000 4% Genl. Mtg. due 1995, Int. 1 April & Oct.:

1922.

Oct. 2. 6 mos.' int. to Oct. 1, 1922 ..... $200

[fol. 54]

1923.

Apl. 2. " " " " Apl. 1, 1923 200

400 00

New York Gas & Electric Light Heat & Power Co. Bonds, Bal. $6,000 4% pur. money, due 1949, int. 1 Feb. & Aug.:

1922.

Aug. 1. 6 mos.' int. to Aug. 1, 1922 ..... $120

1923.

Feb. 1. " " " " Feb. 1, 1923 120

240 00

	New York City Dock Bonds, $10,000 3½% due 1927 Int. 1 May & Nov.:				
	1922.				
Nov.	1. 6 mos.' int. to Nov. 1, 1922	$175			
	1923.				
May	1. " " " " May 1, 1923	175			
			350 00		
	Chicago, Milwaukee & St. Paul Ry. Co., Bonds $10,000 4½% Genl. Mtg. 1889, Int. 1 Jan. & July:				
	1923.				
Jan.	2. 6 mos.' int. to Jany. 1, 1923	$225			
July	2. " " " " July 1, "	225			
			450 00		
	Forward		$223,453 73	$808,685 75	$4,039,003 24

Receipts—Continued

[fol. 55]	Forward			$223,453.73	$808,685.75	$4,039,003.24
	New York City Bonds Water Supply 10,000 4½% due 1963 Int. 1 Mch. & Sep.:					
1922.						
Sept. 1.	6 mos.' int. to Sep. 1, 1922		$225			
1923.						
Mch. 1.	" " " " Mch. 1, 1923		225			
				450.00		
	New York City 4½% Bonds $40,000 1957 due 1 May & Nov.:					
May 1.	6 mos.' int. to date			900.00		
	Hocking Valley Ry. Co. Cons. Mtg. $2,000 4½% due 1999 Int. 1 Jan. &					
1923	July:					
Jan. 2.	6 mos.' int. to Jan. 1, 1923		$45			
July 2.	" " " " July 1, "		45.00			
				90.00		

	City of Cleveland, O., 5's 1927, $20.-				
1922.	000:				
Aug. 1.	6 mos.' int. to Aug. 1, 1922	$500			
1923.					
Feb. 1.	" " " " Feb. 1, 1923	500			
			1,000.00		
[fol. 56]	United States Liberty Bonds "First," $155,000 at 3½%, Int. 15 June &				
1922.	Dec.:				
Dec. 15.	6 mos.' int. to Dec. 15, 1922	$2,712.50			
1923.					
June 15.	6 mos.' int. to June 15, 1923	2,712.50			
			5,425.00		
	United States Liberty Bonds "Second," $40,000, at 4¼%, Int. 15 May				
1922.	& Nov.:				
Nov. 15.	6 mos.' int. to Nov. 15/22	$850.00			
1923.					
May 15.	" " " " May 15/23	850.00			
July 12.	Accrued int. from May 15, 1923 to date all bonds sold	269.16			
			1,969.16		
	Forward		$233,287.89	$808,685.75	$4,039,003.24

[fol. 57]	Forward	$233,287.89	$808,685.75	$4,039,003.24
	United States Liberty Bonds, "Third," $50,050 at 4¼%, Int. 15 Mch. & Sept.:			
1922.				
Sep. 15.	6 mos.' int. on $50,000 to Sept. 15, 1922	$1,062.50		
Oct. 14.	Same on $50.....	1.07		
1923.				
Mch. 15.	6 mos.' int. to Mch. 15, 1923, on $50,050	1,063.56		
			2,127.13	
	United States Liberty Bonds, "Fourth," $40,000 at 4¼%, Int. 15 Apl. & Oct.:			
1922.				
Oct. 16.	6 mos.' int. to Oct. 15, 1922.....	$850.00		
1923.				
Apl. 16.	6 mos.' int. to Apl. 15, 1923.....	850.00		

July 12.	Accrued int. from Apl. 15, to date on $15,000 bonds sold.....	154.06			
			1,854.06		
1922.	Federal Land Bank Bonds:				
Nov. 1.	6 mos.' int. at 5% on $35,000.....	$875.00			
" "	6 mos.' int. at 4½% on $65,000.....	1,462.50			
1923.					
May 1.	6 mos.' int. at 5% on $35,000.....	875.00			
" "	6 mos.' int. at 4½% on $65,000.....	1,462.50			
			4,675.00		
[fol. 58]	Interest allowed by Fulton Trust Co. on balances:				
1922.					
Dec. 31.	Interest to date.....	$687.03			
1923.					
June 30.	" " "	795.37			
			1,482.40		
				243,426.48	
	Forward			$1,025,112.23	$4,039,003.24

	Forward		$1,025,112.23	$4,039,003.24
	These Accounts also charge themselves with proceeds sale of income investments showing profit:			
1923.				
July 11.	Proceeds sale of $40,000 United States Second Liberty Bonds at 98 11/32	$39,337.50		
	Cost	35,528.00		
	Profit		3,809.50	
" "	Proceeds sale $15,000 United States Fourth Liberty Bonds at 98 12/32	$14,756.25		
[fol. 59]	Cost:			
	5,000 (5 a/c)	5,000.00		
	800 (6 a/c)	687.84		
	4,200 (7 a/c)	4,200.00		
	5,000 (7 a/c)	4,290.00		
		14,177.84		
	Profit		578.41	4,387.91
				1,056,500.14
				$5,095,503.38

Disbursements

These accounts claim credit and allowance for the following disbursements made by them:

I.

Principal Account—Administration Expenses.

1922.		Voucher No.		
Aug. 14.	A. Westbrook Co. for lithographing Eighth Account of Executors	1	50 00	
Nov. 2.	F. E. Powell for disbursements July 1 to July 6, 1922, for rent of Cadogan Square dwelling, electricity, gas, insurance, care cemetery plot, &c. £57.11.0 at 4.46	2	256 67	
Nov. 21.	Register of Wills, Washington, D. C. costs, &c. re Eighth Executors Account	3	223 20	
Dec. 13.	Charles V. Imlay, fees and disbursements as Guardian ad litem on Executors Eighth Account	4	797 25	
	Forward		$1,327 12	$5,095,503 38

[fol. 60]

Disbursements.—Continued

			Voucher No.		
	Forward			$1,327.12	$5,095,503.38
1923.					
Feb.	5. Lawrence, Webster, Messer & Nicholls for legal services and disbursements*ments* on disposing of some English securities £18-4-6 @ 4.65 1/32		5	84.27	
Mch.	15. McKenney & Flannery, Bill for services and disbursements for Dec. 31, 1922		6	1,323.92	
	26. Safe Deposit Co. of N. Y. rent of Safe to Mch. 28, 1924		7	50.00	
Apl.	13. F. E. Powell for disbursements Oct. 11/22 to Mch. 1/23 for water rates, electricity, gas, rent, insurance &c. in London £61-2-0 @ 4.68		8	285.95	
"	23. McKenney & Flannery, bill disbursements to Mch. 31/22		8½	98.00	
June	30. Disbursements in action McDonald v. McDonald to June 1, 1923:				
	Joseph S. Graydar	$354.00	9		
	Lawrence Maxwell	209.24	10		
					563.24
July	5. Fulton Trust Co. for disbursements July 22 to date		11	274.99	
"	5. DeWitt, Lockwood & DeWitt, bill for legal services during past year		12	1,616.90	
				$5,624.39	

[fol. 61] These accountants also claim and hereby retain for their services a commission of five per cent upon profits realized on proceeds of inventoried items, and the par or face value of stocks received as dividend, viz.: $1,571,929.32 ..... 78,596.47

Total principal expended $84,220.86

Forward $5,095,503.38

Forward $5,095,503.38

II

Income Account

These accountants claim credit and allowance for the following disbursements from income paid by them.

Administration Expenses Charged to Income:

1922.		Voucher No.	
Sep. 13.	Collector of U. S. Internal Revenue 2nd District N. Y. third installment of income tax for 1921	13	$9,392.22
Nov. 25.	Collector of Taxes—District of Columbia—1st half Personal Taxes for 1923	14	11,559.93
Dec. 13.	Collector of U. S. Internal Revenue 2nd District N. Y. fourth installment of income tax for 1921	15	9,392.22

[fol. 62] Disbursements.—Continued

1923.		Voucher No.		
Mch. 13.	Collector of U. S. Internal Revenue 2d District of N. Y. first installment of income tax for 1922 income	16	10,619.80	
	Same for additional tax levied on 1917 income	17	1,661.92	
Mch. 19.	Notary fees on Income returns	18	.75	
May 23.	Collector of Taxes—District of Columbia 2nd half. Personal Taxes for year 1923	19	11,559.93	
June 13.	Collector of U. S. Internal Revenue 2nd District of N. Y. second installment of income tax for 1922	20	10,619.79	
	Accrued Interest @ 4½% on Following Purchases:			
Mch. 13.	12 days on $25,000 New York City Bonds	21	52.50	
" "	4 mos. 12 days 30,000 do.	21	495.00	
" 15.	do. 10,000 do.	21	165.00	
July 11.	Commissions on sale $55,000 United States Liberty Bonds	..	34.38	
			$65,553.44	$5,095,503.38
	Forward			$5,095,503.38

1922. Annuities Paid:

Aug.	1.	James McDonald	$2,083.33	22	
Sep.	1.	"	2,083.33	23	
Oct.	1.	"	2,083.34	24	
Nov.	1.	"	2,083.33	25	
Dec.	1.	"	2,083.33	26	

[fol. 63]

1923

Jan.	3.	"	2,083.34	27	
Feb.	1.	"	2,083.33	28	
Mch.	1.	"	2,083.33	29	
Apl.	2.	"	2,083.34	30	
May	1.	"	2,083.33	31	
June	1.	"	2,083.33	32	
July	2.	"	2,083.34	33	
					$25,000.00

1922.

Aug.	1.	Mrs. Nellie Carpenter	$300.00	34	
Sept.	1.	"	300.00	35	
Oct.	1.	"	300.00	36	
Nov.	1.	"	300.00	37	
Dec.	1.	"	300.00	38	

1923.					
Jan.	3.	Mrs. Nellie Carpenter	300.00	39	
Feb.	1.	"	300.00	40	
Mch.	1.	"	300.00	41	
Apr.	2.	"	300.00	42	
May	1.	"	300.00	43	
June	1.	"	300.00	44	
July	1.	"	300.00	45	
					3,600.00
1922.					
Aug.	1.	Mrs. Sarah A. Fraser	$100.00	46	
Sep.	1.	"	100.00	47	
Oct.	1.	"	100.00	48	
Nov.	1.	"	100.00	49	
Dec.	1.	"	100.00	50	
[fol. 64]					
1923.					
Jan.	3.	"	100.00	51	
Feb.	1.	"	100.00	52	
Mch.	1.	"	100.00	53	
Apl.	2.	"	100.00	54	
May	1.	"	100.00	55	

June	1.	"	....	100.00	56		
July	1.	"	....	100.00	57		
						1,200.00	
		Forward				$29,800.00	$5,095,503.38
		Forward				$29,800.00	$5,095,503.38
1922.							
Aug.	1.	Mrs. Helen B. Rule.....		$75.00	58		
Sep.	1.	"	.....	75.00	59		
Oct.	1.	"	.....	75.00	60		
Nov.	1.	"	.....	75.00	61		
Dec.	1.	"	.....	75.00	62		
1923.							
Jan.	3.	"	.....	75.00	63		
Feb.	1.	"	....	75.00	64		
Mch.	1.	"	.....	75.00	65		
Apl.	1.	"	.....	75.00	66		
May	1.	"	.....	75.00	67		
June	1.	"	.....	75.00	68		
July	1.	"	.....	75.00	69		
						900.00	
						$30,700.00	

[fol. 65] These accountants also made the following investments of income:

1923.		
Mch. 13.	Purchased $35,000 New York City 4½% Bonds Mch. 1963 @ 106⅞	$37,406.25
"	Purchased $10,000 New York City 4½% Bonds Nov. 1957 @ 106⅝	10,662.50
"	Purchased $20,000 New York City 4½% Bonds May 1957 @ 106⅝	21,325.50
15.	Purchased $10,000 New York City 4½% Bonds May 1957 @ 106⅝	10,662.50
Apl. 23.	Subscribed for 1,689 shares Standard Oil Co. of California @ 25 per share New stock	42,225.00
		$122,281.25
	These accountants also claim and hereby retain for their services a commission of Five (5) per cent upon the annual income and profit on income investments received	12,390.72
	Total Income expended	$108,644.16

Total Principal and Income Expenses as follows:

Total Principal	84,220.86		
" Income	108,644.16		
		192,865.02	
[fol. 66] Forward		$192,865.02	$5,095,503.38
Forward		$192,865.02	$5,095,503.38
Net balance on July 12, 1923 in hands of accountants to be held under provisions of testator's will		4,902,638.36	
		$5,095,503.38	$5,095,503.38

Report under Rule 18

NOTE.—Principal		$3,954,782.38
Income		947,855.98
		$4,902,638.36

Report under Rule 18—Continued

The above mentioned balance consists of the following assets and cash, viz:

Inventoried Assets on Hand at Values Shown in Inventory

Shares			
	Bonds:		
$10,000	Union Pacific R. R. Co. 4% 1947	$9,537.50	
8,000	Atchison, Topeka & Santa Fe Ry. Co. 4% 1995	7,450.00	
2,000	do. do. 4% 1995	1,862.50	
6,000	N. Y. Gas & Elec. L. H. & P. Co. Bds. 4% Bonds 1949	5,070.00	
10,000	New York City Dock Bonds 3½% 1927	9,250.00	
10,000	Chic. Mil. & St. P. Ry. Co. 4½% 1989	10,000.00	
10,000	New York City Water Supply 4½% 1963	10,475.00	
2,000	Hocking Valley R. R. 4½% 1999	1,915.00	
			55,560.00
[fol. 67]	Stocks:		
1,956	Anglo America Oil Co.	28,362.00	
65	Atlantic Refining Co.	37,895.00	
4	Borne-Scrymser Co.	1,020.00	
342	Buckeye Pipe Line Co.	39,330.00	
5	Cheseborough Manufacturing Co.	3,300.00	
51	Continental Oil Co. (now 204 shares par $25.)	11,475.00	
103	Crescent Pipe Line Co. (now par $25.)	2,060.00	
17	Cumberland Pipe Line Co.	850.00	

85	Eureka Pipe Line Co.	19,975.00	
29	Galena Signal Oil Co Old Preferred	4,060.00	
144	Galena Signal Oil Co. Common	24,480.00	
171	Indiana Pipe Line Co.	18,297.00	
869	National Transit Co. @ $12.50 par value @ 18¼ per shr. (corrected)	15,859.25	
	Forward	$206,963.25	$55,560.00
	Forward	$206,963.25	$55,560.00
85	New York Transit Co.	19,550.00	
1,025	Ohio Oil Co. (par $25.)	143,500.00	
308	Prairie Oil & Gas Co.	144,760.00	
35	Solar Refining Co.	8,750.00	
171	Southern Pipe Line Co.	37,449.00	
213	South Penna. Oil Co.	60,066.00	
60	So. West Penna. Pipe Line	7,200.00	
844	Standard Oil Co. of California (now 3,376 shares, par $25)	261,640.00	
513	Standard Oil Co. of Indiana (now 2,052 shares par $25)	241,110.00	
[fol. 68]			
34	Standard Oil Co. of Kansas (now 136 shares par $25)	11,900.00	
51	Standard Oil Co. of Kentucky (now 204 shares par $25)	12,903.00	
17	Standard Oil Co. of Nebraska	5,525.00	
1,500	Standard Oil Co. of New Jersey (now 600 shares par $25)	600,000.00	

Shares			
1,274	Standard Oil Co. of New York (now 5,096 shares par $25)	252,252.00	
60	Standard Oil Co. of Ohio	25,500.00	
10	Swan & Finch Co.	1,600.00	
205	Union Tank Car Co.	17,425.00	
255	Vacu-m Oil Co. (now 1,020 shares, par 25)	50,745.00	
12	Washington Oil Co.	420.00	
750	National Lead Co. Preferred	80,625.00	
100	Fulton Trust Co.	25,000.00	
21	National Fuel Gas Co.	4,095.00	
100	N. Y. N. H. & H. R. R. Co.	5,350.00	
34	Kuhne-Libby Co. Preferred	.....	
100	National Bank of Commerce	16,400.00	
12,000	Castle Creek Mining Co.	.....	
13,000	Castle Creek Mining Co.	.....	
100	American Registered Ltd. Preferred shares	.....	
			2,240,728.25
60	Phyllis Court Club	Nominal.	
9,224	L. &. H. Pinto, Ltd. preferred	Worthless.	
11,559	L. &. H. Pinto, Ltd. ordinary	Worthless.	
100	English & American Shipping Co. (now in liquidation) bal.	Unknown.	
	Forward		$2,296,288.25

[fol. 69]	Forward		$2,296,288.25
1,000	Valdeorros Gold Mining Co	Worthless.	
80	National Galvanic Battery Co	Worthless.	
1,000	Palmer Group Mining Co	Worthless.	
1	Cincinnati Museum Ass'n	Worthless.	
1	Cincinnati Musical Festival Ass'n	Worthless.	
5	Phyllis Court Club Co	60.87	
21	Automobile Cons'd Alliance Ltd	Worthless.	
10	British Empire Club	Nominal.	
1	Automobile Owners' Ass'n	Worthless.	
2	Royal Automobile Club Bldgs. Co	Nominal.	
	House on leasehold 57 Cadogan Square	Nominal.	
	Loan to Effie McKenzie Evans	664.75	
	Loan to Castle Creek Mining Co	Worthless.	
21	Automobile Co. Operative Ass'n	Worthless.	
			725.62
	Also the following assets not inventoried:		
503	1966766/2950149 shs. Illinois Pipe Line Co	.....	70,513.33
	Also the following shares of stock received as dividends at par value:		
1,3849/19+	Prairie Pipe Line Co. (par 100):		
	461 9/19+ shares (previous Account	46,150.00	
	923 shares (Jan. 23)	92,300.00	
		138,450.00	

Shares.			
8	Chesebrough Manufacturing Co. (par 100).....	800.00	
180	Standard Oil Co. of Ohio:		
	60 shares (par 100).....	6,000	
	120 " (par 100) Dec. 22.....	12,000	
		18,000.00	
10,136	Standard Oil Co. of California:		
	3,380 shares (par 25).....	84,500	
	6,756 " (" 25) Dec. 22.....	168,900	
		253,400.00	
127	786706/983383 South Penn Oil Co. (par 100).....	12,780.00	
792+	Standard Oil Co. of Kentucky (par 25):		
	204 shares (par 25) formerly.....	.....	
	51 (par 100) (May 17).....	5,100	
	136 shares (par 25) (May 22).....	3,400	
	452+ shares (par 25) (Dec. 22).....	11,300	
		19,800.00	
	Forward	443,230.00	$2,367,527.20

	Forward		$443,230.00	$2,367,527.20
408	Continental Oil Co. (par 25) (May '20)		10,200.00	
1,678	Anglo American Oil Co. at cost of 7.50 per share		12,585.00	
343/5	Galena Signal Oil Co. New Pfd. at cost of $100 per share		3,460.00	
5	Swan Finch Co. at cost of 100 per share		500.00	
34	Standard Oil Co. of Nebraska (par 100)		3,400.00	
[fol. 71]				
8,208	Standard Oil Co. of Indiana (par 25):			
	3,078 shares	76,950.00		
	5,130 " (Jan. '23)	128,250.00		
			205,200.00	
21	National Fuel Gas Co. (par 100) (Dec. '22)		2,100.00	
585	Atlantic Refining Co. (par 100) (Dec. '22)		58,500.00	
16	Borne-Scrymser Co. (par 100) (Dec. '22)		1,600.00	
17	Cumberland Pipe Line Co. (par 100) (Jan. '23)		1,700.00	
3,075	Ohio Oil Co. (par 25) (Jan. '23)		76,875.00	
616	Prairie Oil & Gas Co. (par 100) (Jan. '23)		61,600.00	
35	Solar Refining Co. (par 100) (do.)		3,500.00	
408	Standard Oil Co. of Kansas (par 25) (Jan. '23)		10,200.00	
24,000	Standard Oil Co. of New Jersey (par 25) (Dec. '22)		600,000.00	
10,192	Standard Oil Co. of New York (par 25) (Dec. '22)		254,800.00	
102	Union Tank Car Co. (par 100 (Dec. '22)		10,200.00	
3,060	Vacuum Oil Co. (par 25) (Jan. '23)		76,500.00	
				1,836,150.00

Report under Rule 18—Continued

Also the following investments of principal made by the Executors:

Shares			
$67,000	United States First Liberty 3½% Bonds at cost of.....	66,433.00	
1,678	Standard Oil Co. of N. J. 7% preferred stock cost	167,800.00	
160	Atlantic Refining Co. 7% preferred stock cost.....	16,000.00	
29,000	Federal Land Bank 4½% bonds of 1922/42 at cost of (June '22)	29,090.63	
			279,323.63
			4,483,000.83
	Forward		4,483,000.83
[fol. 72]			
	Forward		$4,483,000.83

Investment of Income

Also the following Bonds received as dividends on stock:

$4,200	United States Third Liberty 4¼% Bonds received from Standard Oil Co. of California.....	$4,200.00
50	United States Third Liberty 4¼% Bond- from National Fuel Gas Co. at cost of (Jan. '22).....	49.49
		4,249.49

Also the following investments of Income made by the Executors:

Shares			
$45,800	United States Third Liberty Bonds Cost	43,537.48	
25,000	" " Fourth " " "	25,000.00	
100	Atlantic Refining Co. 7% preferred stock	10,000.00	
$20,000	City of Cleveland, Ohio 5% Bonds of Aug. 1, 1927	20,491.98	
9	Chesebrough Manufg. Co. 7% prefd. stock, cost	905.00	
120	Standard Oil Co. of Ohio 7% prefd. stock, cost	12,000.00	
205	Union Tank Car Co. 7% pref. stock cost	20,500.00	
$88,000	United States "First" Liberty Bonds at 3½% cost	81,207.00	
17	Continental Oil Co. stock (par 100) April cost	1,700.00	
$71,000	Federal Land Bank bonds cost (June '22) 35,000 5%—1931/41—36,000 4½% 1932/42	72,512.50	
136	Standard Oil Co. of Kentucky par 25 per sh. (May '22)	3,400.00	
[fol. 73]			
$10,000	New York City 4½% Bonds (Nov. '57) (Mch. '23) cost	10,662.50	
$30,000	do. " " (May '57) (Mch. '23) cost	31,987.50	
$35,000	do. " " (Mch. '63) (Mch. '23) cost	37,406.25	
1,689	shares Standard Oil Co. of California (Apr. '23) cost	42,225.00	
			417,784.70
			$4,900,785.53
	Cash balance on hand		1,852.83
			4,902,638.36

Special Account

of legacy to James McDonald, Jr., by the Sixth Clause of the Codicil to will of James McDonald deceased wherein the Executors were authorized to advance to James McDonald Jr. a sum not to exceed $50,000 for the purpose of erecting a house, which amount the Executors were directed by the Supreme Court of the District of Columbia holding probate Court to set aside and hold subject to the further order of said Court and to invest same in any of certain designated securities and to pay the income therefrom to said James McDonald, Jr.

Receipts

These accountants charge themselves with the following amounts received:

Principal account:

1923.			
July 5.	Balance of Principal in hands of Executors as shown by their Eighth Account		$49,935 00

[fol. 74] Income account:

1923.			
July 5.	Balance of Income in hands of Executors as shown by their Eighth Account	$169 83	

Income received:

$10,000 Atchison, Topeka & Santa Fe Ry. Co. Genl. 4% Int. 1 Apl. & Oct.:

1922.				
Oct.	2.	6 mos.' int. to date	$200 00	
1923.				
Apl.	1.	6 " " " "	200 00	
				$400 00

$10,000 Northern Pacific Ry. Co. P/L 4%, Int. 1 Jan. Apl. July & Oct.:

1922.				
Oct.	1.	3 mos.' int. to date	$100 00	
1923.				
Jan.	2.	3 " " " "	100 00	
Apl.	1.	3 " " " "	100 00	
July	2.	3 " " " "	100 00	
				400 00

Special Account—Continued

[fol. 75]	$10,000 Chicago & Northwestern Ry. Co. Gen. 4%, Int. 1				
1922.	May & Nov.:				
Nov. 1.	6 mos.' int. to date	$200.00			
1923.					
May 1.	6 " " " "	200.00			
			400.00		
	Forward		1,200.00	$169.83	$49,935.00
	Forward		$1,200.00	$169.8[illegible]	$49,935.00
	$10,000 Union Pacific Ry. Co. 1st Mtg. 4% Int. 1 Jan. &				
1823.	July:				
Jan. 2.	6 mos.' int. to date	$200.00			
July 2.	6 " " " "	200.00			
			400.00		
	$10,000 Pennsylvania R. R. Co. Cons. 4½% of 1960 Int.				
1922.	1 Feb. & Aug.:				
Aug. 1.	6 mos.' int. to date	$225.00			
1923.					
Feb. 1.	6 " " " "	225.00			
			450.00		

[fol. 76] $2,000 Nor. Pacific Ry. Co. Genl. 3% Int. 1 Feb., May, Aug. & Nov.:

1922.					
Aug.	1.	3 mos.' int. to date	$15.00		
Nov.	1.	3 " " " "	15.00		
1923.					
Feb.	1.	3 " " " "	15.00		
May	1.	3 " " " "	15.00		
				60.00	
1922.					
Dec.	31.	Interest allowed by Fulton Trust Co. on balances	$2.96		
1923.					
June	30.	Interest allowed by Fulton Trust Co. on balances	2.38		
				5.34	2,115.34	2,285.17
						52,220.17

Special Account—Continued

[fol. 77] Disbursements

Principal account:

Nothing.

Income account:

These accountants claim credit and allowance for the following disbursements from income made by them:

			Voucher number	
1922.				
Aug. 1.	Income paid to James McDonald, Jr	$170.00	a	
Sept. 1.	do.	170.00	b	
Oct. 2.	do.	170.00	c	
Nov. 1.	do.	170.00	d	
Dec. 1.	do.	170.00	e	
	Forward	850.00		$52,220.17
	Forward	850.00		$52,220.17
Jan. 2.	Income paid to James McDonald, Jr	170.00	f	
Feb. 1.	do.	170.00	g	

Mch. 1.	do.	.....	170.00	h
Apl. 1.	do.	.....	170.00	i
May 1.	do.	.....	170.00	j
June 1.	do.	.....	170.00	k
July 2.	do.	.....	170.00	l
[fol. 78]			$2,040.00	

These accountants also claim and hereby retain a commission of Five (5) per cent upon the annual income received on the Special Account for James McDonald Jr., as per this account amounting to $2,115.34 as their compensation for services on such income received 105.76

	2,145 76	
Balance	50,074 41	
	$52,220 17	$52,220 17

Report under Rule 18

Principal	$49,935 00
Income	139 41
	$50,074 41

The above mentioned balance consists of the following Assets at the prices paid for the same March 14, 1916 by the Executors and cash, viz:

$10,000 Atchison, Topeka & Santa Fe Ry Co. Bonds Genl. 4% of 1995 @ 94⅝	9,462 50
$10,000 Nor. Pacific R. R. Co. P/L 4% Bonds of 1997 @ 93⅝	9,362 50
$10,000 Chicago & North Western Ry. Co. Bonds Genl. 4% 1897 @ 94½	9,450 00
$10,000 Union Pacific Ry. Co. Bonds 1st Mtg. 4% of 1947 @ 97⅝	9,762 50
$10,000 Pennsylvania R. R. Co. Bonds Cons. 4½% of 1960 @ 105⅝	10,562 50
$ 2,000 Nor. Pacific Ry. Co. Bonds Genl. 3% of 2047 @ 66⅛	1,322 50
Assets	49,922 50
Cash	151 91
	$50,074 41

[fol. 79] *Duly sworn to by Lawrence Maxwell and Arthur J. Morris. Jurats omitted in printing.*

In Supreme Court of the District of Columbia, Holding a Probate Court

Order Approving Ninth Account of Executors

On this 22nd day of August, A. D. 1924, the foregoing nine & Final account, being now presented for approval, the same is, after examination by the Court, approved and passed, the executors being allowed $12,390.72 commission on income, as claimed but being hereby allowed $50,000.00 commission on increase in principal instead of $78,596.47 claimed.

William Hitz, Justice.

[fol. 80] In Supreme Court of the District of Columbia, Holding Probate Court

No. 21417, Administration

Certificate of Deputy Register of Wills—October 1, 1923

I certify that Fulton Trust Company of New York has this day exhibited to me, under Rule 18, of the Probate Court, the securities described in the attached report, together with the bank book, duly balanced, showing the deposits to the credit of this estate, as set out in the report, and that the securities and book have been examined and verified in accordance with said rule.

Theodore Cogswell, Deputy Register of Wills.

[File endorsement omitted.]

In Supreme Court of District of Columbia

Note of Appeal—Filed in Probate Court Sept. 11, 1924

Now come James McDonald, Jr., by his counsel Hamilton & Hamilton, and James McDonald, 3d, and Alexander McDonald, infants, by their guardian ad litem Charles V. Imlay, and note an appeal to the Court of Appeals of the District of Columbia from the judgment of the Supreme Court of the District of Columbia holding Probate Court, ap-

proving the ninth account of Lawrence Maxwell and Fulton Trust Company, Executors, and allowing commissions to said Executors, and in effect overruling the exceptions filed to said account.

Hamilton & Hamilton, Attorneys for James McDonald, Jr. Charles V. Imlay, Guardian ad Litem of James McDonald, 3d, and Alexander McDonald, Infants.

[File endorsement omitted.]

[fol. 81] In Supreme Court of District of Columbia

Memorandum re Bond on Appeal

Sept. 15, 1924.—Undertaking on Appeal of $100 filed and approved.

In Supreme Court of District of Columbia

Assignments of Error—Filed in Probate Court September 29, 1924

Come now James McDonald, Jr., and James McDonald, 3d, and Robert Alexander McDonald, infants, by Charles V. Imlay, their guardian ad litem, appellants herein, and make this their asignment of errors as follows:

1. That the Court erred in entering the order of August 22, 1924, approving the Ninth Account of the executors herein.

2. That the Court erred in approving that part of the Ninth Account, which allows a commission on any part of the sum of $1,570,325, being the total of the par or face value of stock dividends received in the accounting period and being almost the whole of the amount of $1,571,929.32 listed by the executors as additions to principal upon which allowance for commissions was asked by them.

3. That the Court erred in approving that part of the Ninth Account, as amended by the Court in its order of August 22, 1924 which allows a commission of $50,000 on

increase in principal, except as to that part of the total of $50,000 which may be based on the sum of $1,604.32, being the difference between the sum of $1,571,929.32, the total of the alleged additions to principal and the sum of $1,570,325, the total of the par or face value of stock dividends, received during the accounting period covered by the Ninth Account.

4. That the Court erred in its order of August 22, 1924, in treating stock dividends listed in the Ninth Account as an increase in principal upon which an allowance for commissions to the executors might be based.

5. That the Court erred by its order of August 22, 1924, in overruling in effect the exceptions to the Ninth Account filed by James McDonald, 2d.

6. That the Court erred in its order of August 22, 1924, in overruling in effect the exceptions to the Ninth Account filed by James McDonald, 3d, and Robert Alexander McDonald by Charles V. Imlay, their guardian ad litem.

Hamilton & Hamilton, Allison, Lynch & Phillips, Attorneys for James McDonald, 2d. Charles V. Imlay, Guardian ad Litem for James McDonald, 3d, and Robert Alexander McDonald.

Service of copy hereof acknowledged Sept. 25, 1924.
McKenney & Flannery, Attys. for Executors.

[File endorsement omitted.]

[fol. 82] In Supreme Court of District of Columbia

Præcipe for Transcript of Record—Filed in Probate Court September 29, 1924

To the Register of Wills of the District of Columbia:

You will please include in the transcript of record on appeal in the above entitled cause the following:

1. Copy of Will and Codicil of James McDonald, deceased.
2. Petition of Lawrence Maxwell and the Fulton Trust Company of New York for probate.

3. Order of January 20, 1915, admitting Will and Codicil to probate and granting letters.
4. Order of December 5, 1918, appointing Charles V. Imlay guardian ad litem.
5. Report and exceptions of guardian ad litem filed October 22, 1923, to Executor's account.
6. Exceptions of James McDonald, Jr., to said account, filed October 24, 1923.
7. Ninth Account of Executor approved and passed August 22, 1924.
8. Notation of appeal and fixing of cost bond.
9. Memo. filing and approval of bond on appeal.
10. Assignment of error.
11. This designation of record.

Hamilton & Hamilton, of Counsel for James McDonald, Jr. Charles V. Imlay, Guardian ad Litem.

Service of copy hereof acknowledged Sept. 25, 1924.
McKenney & Flannery, Attys. for Executors.

[File endorsement omitted.]

IN SUPREME COURT OF DISTRICT OF COLUMBIA

CLERK'S CERTIFICATE

DISTRICT OF COLUMBIA, To wit:

I, Theodore Cogswell, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify the foregoing pages, numbered from 1 to 83, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 21,417, estate of James McDonald, deceased, wherein James McDonald, Jr., by his counsel, Hamilton & Hamilton, and James McDonald, 3rd, and Alexander McDonald, infants, by their Guardian ad Litem, Charles V. Imlay, are Appellants, and Lawrence Maxwell [fol. 83] and Fulton Trust Company, Executors, are Appellees, the same constituting a full, true and correct transcript of record of proceedings had in said cause according to the designation of counsel filed therein and made a part hereof.

I further certify, That the bond for appeal, in the penalty of one hundred dollars, was duly filed by said appellants, and approved by said Court on the 15th day of September, A. D. 1924.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Probate Court, this 29th day of October, A. D., 1924.

Theodore Cogswell, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court. (Seal Supreme Court of the District of Columbia, Probate Jurisdiction.)

[fol. 84] In Circuit Court of District of Columbia

No. 4251

James McDonald, Jr., by His Counsel, Hamilton & Hamilton, and James McDonald, 3rd, and Alexander McDonald, Infants, by Their Guardian ad Litem, Charles V. Imlay, Appellants,

vs.

Lawrence Maxwell and Fulton Trust Company, Executors

Argument of Cause—April 7, 1925

The argument in the above entitled cause was commenced by Mr. C. V. Imlay, attorney for the appellants, and was continued by Messrs. G. B. Craighill and J. S. Flannery, attorneys for the appellees, and was concluded by Mr. J. J. Hamilton, attorney for the appellants.

[fol. 85] In Court of Appeals of the District of Columbia

[Title omitted]

Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices

Opinion

Mr. Justice Robb delivered the opinion of the Court:

Appeal from a judgment in the Supreme Court of the District, holding Probate Court, approving the ninth and

final account of appellees as Executors under the will of James McDonald and allowing appellees $12,390.72 commission on income and "$50,000.00 commission on increase in principal instead of $78,596.47 claimed."

A proceeding in the Probate Court in this jurisdiction and final orders therein are reviewable only in accordance with the practice at common law, and evidence in such cases must be brought up in a bill of exceptions. Craighead vs. [illegible] App., D. C., 229, 234. In the absence of a bill of exceptions, this court must assume that the evidence adduced at the trial was sufficient to justify the order from which the appeal is taken. Fletcher vs. Fletcher, 43 App., D. C. 180.

[fol. 86] There is no bill of exceptions in the present case, nor does the record contain or purport to contain the substance of the testimony in the case. We have before us, on the contrary, merely the final account of the Executors and the ruling of the Court thereon. In this account the aggregate value of the estate is shown to be almost $5,000,000 and the Executors, in addition to the claim for commission on income collected since the preceding account, "also claim and hereby retain for their services a commission of Five per cent upon profits realized on proceeds of inventoried items, and the par or face value of stocks received as dividend, viz.: $1,571,929.32," or $78,596.47. The Court below, evidently after a hearing in which all pertinent facts and circumstances were considered, reached the conclusion that the Executors were entitled to $50,000 commission on increase in principal and made that allowance. The facts and circumstances upon which this allowance was based are not before us, and, there being nothing on the face of the record to indicate error, it is apparent that the judgment must be affirmed, with costs, and it is so ordered.

Affirmed.

(Signed) Chas. H. Robb, Associate Justice.

[fol. 87] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

JUDGMENT—May 4, 1925

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Justice Robb, May 4, 1925.

[fol. 88] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

MINUTE ENTRY

Motion for rehearing and stay of mandate filed May 13, 1925.

[fol. 89] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND STAYING MANDATE—May 15, 1925

On consideration of the motion for a rehearing in the above entitled cause, it is ordered by the Court that said motion be, and the same is hereby, denied. And it is further ordered that the mandate be stayed a reasonable time that appellant may apply to the Supreme Court of the United States for relief, if so advised.

[fol. 90] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

CLERK'S CERTIFICATE

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 89, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of [title omitted], No. 4251, April Term, 1925, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22nd day of May, A. D. 1925.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

[fol. 91] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1925

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court, U. S.
FILED
JUN 19 1925
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. [redacted] 147

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, ETC., PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, WITH NOTICE AND PROOF OF SERVICE.

M. M. ALLISON,
JOHN J. HAMILTON,
CHARLES V. IMLAY,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 555.

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN *ad Litem*, CHARLES V. IMLAY, PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS, RESPONDENTS.

NOTICE OF SUBMISSION.

Respondents are hereby notified that the annexed petition for a writ of certiorari to the Court of Appeals of the District of Columbia, together with the annexed brief and a copy of the record, will be submitted to the Supreme Court of the United States at a term thereof to be held at the Capitol in the City of Washington on Monday, October 5, 1925,

at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated June 16, 1925.

Yours, etc.,

M. M. ALLISON,
JOHN J. HAMILTON,
Counsel for James McDonald, Jr.
CHARLES V. IMLAY,
Guardian ad Litem and Counsel for James McDonald, 3d, and Alexander McDonald, Infants.

Service of the foregoing notice, together with copy of petition and brief in support thereof, is hereby admitted this 19th day of June, 1925.

McKENNEY & FLANNERY,
Attorneys for Lawrence Maxwell and Fulton Trust Co., Respondents.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 555.

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN *ad Litem*, CHARLES V. IMLAY, PETITIONERS,

versus

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, WITH BRIEF IN SUPPORT THEREOF, AND NOTICE OF SUBMISSION.

M. M. ALLISON,
JOHN J. HAMILTON,
CHARLES V. IMLAY,
Counsel for Petitioners.

1416 F STREET, N. W.,
WASHINGTON, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 555.

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN *ad Litem*, CHARLES V. IMLAY, PETITIONERS,

versus

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, James McDonald, Jr., James McDonald, III, and Alexander McDonald, the two latter being infants, by their guardian *ad litem*, Charles V. Imlay, in support of

this petition for writ of certiorari, to be directed to the Court of Appeals of the District of Columbia, to review a decree and judgment entered therein on the 4th day of May, 1925, respectfully show:

I.

The defendants, Lawrence Maxwell and Fulton Trust Company, are executors of the last will and testament of James McDonald, deceased, who died on January 13, 1915, in the District of Columbia, where the will was admitted to probate, and defendants appointed as executors thereof.

The executors have made their reports from year to year and have been allowed liberal commissions both on the principal of said estate and on the income thereof (R., p. 16). They have claimed and been allowed commissions on income of ten to twenty thousand dollars per year (*Ibid.*).

II.

On the 20th day of August, 1923, defendant executors filed in the Probate Court of the Supreme Court of the District of Columbia for approval their Ninth Account, showing a balance on hand of July 31, 1922, as per the Eighth Account of $2,467,073.92 principal and $808,685.75 income, and the receipts and disbursements of the period covered by the said Ninth Account.

The bulk of the estate which came into the hands of the executors consists of stock of the Standard Oil Company and its subsidiaries. During the period covered by the said Ninth Account of the said executors there was issued to said executors by the Standard Oil Company and its subsidiaries

stock dividends of the par or face value of $1,570,325.00 (R., p. 69 *et seq.*).

For receiving these stock dividends the executors charged the estate in their hands a commission of 5 per cent. This charge is set out in the report of the executors (R., p. 61) in the following language:

> "These accountants also claim and hereby retain for their services a commission of five per cent on the profits realized on proceeds of inventoried items, *and the par or face value of stock received as dividends,* viz., $1,571,929.32, (amounting to) $78,596.47."

The profits realized on proceeds of inventoried items consisted of items which had been sold for more than the values carried in the inventory. This amounted to only $1,604.32 (R., p. 34).

The $78,596.47 claimed and retained by executors for their services in receiving the stock dividends was in addition to the claim of 5 per cent on $247,814.39, which was allowed by the Court and to which no exception is now made (R., p. 34).

III.

To the part of the executors' report in which they claim and retain for their services a commission of 5 per cent on the par or face value of stock dividends the principal legatees under the will, namely, James McDonald, Jr., James McDonald, III, and Alexander McDonald, the two latter infants, by their guardian *ad litem*, Charles V. Imlay, filed their exceptions on the ground that stock dividends constitute no addition to the value of the estate, either as an increase of principal or of income (R., p. 32).

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> "These accountants also claim and hereby retain for their services a commission of five per cent on the profits realized on proceeds of inventoried items, *and the par or face value of stock received as dividends,* viz., $1,571,929.32, (amounting to) $78,596.47."

The profits realized on proceeds of inventoried items consisted of items which had been sold for more than the values carried in the inventory. This amounted to only $1,604.32 (R., p. 34).

The $78,596.47 claimed and retained by executors for their services in receiving the stock dividends was in addition to the claim of 5 per cent on $247,814.39, which was allowed by the Court and to which no exception is now made (R., p. 34).

III.

To the part of the executors' report in which they claim and retain for their services a commission of 5 per cent on the par or face value of stock dividends the principal legatees under the will, namely, James McDonald, Jr., James McDonald, III, and Alexander McDonald, the two latter infants, by their guardian *ad litem,* Charles V. Imlay, filed their exceptions on the ground that stock dividends constitute no addition to the value of the estate, either as an increase of principal or of income (R., p. 32).

The above claim of the executors and the exceptions of these petitioners constituted the only issue before the Supreme Court of the District of Columbia.

The Supreme Court, acting upon said report and said exceptions, sustained said exceptions only to the extent of reducing the amount claimed by the executors as commission on said stock dividends, from $78,576.47 to $50,000.00.

The opinion of the Supreme Court allowing the said commission on stock dividends is in the following language (R., p. 79):

> "On this 22nd day of August, A. D. 1924, the foregoing ninth and final account, being now presented for approval, the same is, after examination by the court, approved and passed, the executors being allowed $12,390.72 commission on income, as claimed, but being hereby allowed $50,000.00 *commission on increase in principal* instead of $78,596.47 claimed." (The above italics are supplied.)

Petitioners, in their exceptions, do not deny that the executors received the stock dividends as set out in the report, and the only issue in the case was presented by the above claim of the executors, as set out in their Ninth Account and the exceptions of these petitioners as herein stated. The issue thus presented is purely and solely a legal question, namely, whether or not stock dividends constituted additional capital, entitling executors to charge the estate with a commission thereon.

The Court of Appeals of the District of Columbia declined to pass on the one and only question involved in the record and dismissed petitioners' appeal upon the ground that there was no bill of exceptions, thus departing from its own de-

cisions (in particular *Saks v. Stinemetz Company*, 54 App. D. C., 38, 40) that where questions involved sufficiently appear from the pleadings and proceedings of record a bill of exceptions is not necessary.

The Court of Appeals of the District of Columbia not only departed from its own decisions but from the decisions of this Court in dismissing petitioners' appeal upon the ground that there was no bill of exceptions when the only question involved, viz., whether or not stock dividends constituted additional capital entitling executors to charge the estate with a commission thereon,—appeared fully in the record. See *Moline Plough Company v. Webb*, 141 U. S., 616, at page 623, and cases therein cited.

This opinion, while pretermitting the only question involved, can be construed only as holding that stock dividends do constitute additions to the capital and the executors are entitled to charge commission thereon. No other construction can possibly be put upon the language italicized by us in the following opinion of the Court of Appeals:

> "In this account the aggregate value of the estate is shown to be almost $5,000,000.00, and the executors, in addition to the claim for commission on income collected since the preceding account, 'also claim and hereby retain for their services a commission of five per cent upon profits realized on proceeds of inventoried items, *and the par or face value of stocks received as dividends, viz., $1,571,929.32 or $78,596.47. The Court below, evidently after a hearing in which all pertinent facts and circumstances were considered, reached the conclusion that the executors were entitled to $50,000.00 commission on increase in principal, and made that allowance.*"

The record in this case discloses that there were no "pertinent facts and circumstances" to be construed other than the claim made by executors for commission on stock dividends and the exceptions of petitioners thereto upon the ground that stock dividends cannot be considered as an increase of either capital or income (R., p. 32).

The record fails to show that there was any evidence of any kind introduced in the trial of said cause. None was pertinent or germane and no circumstances could have been considered except the one and only question raised by the pleading.

This decision, therefore, will stand, undisturbed and unreversed, as authority for the proposition that stock dividends constitute additional values upon which executors and trustees are entitled to charge additional commission, which holding is in direct conflict with the holdings of this Court in the cases of *Towne v. Eisner*, 245 U. S., 418; *Eisner v. Macomber*, 252 U. S., 189, and *Gibbons v. Mahon*, 136 U. S., 549.

Petitioners submit that under the above circumstances the judgment of the Court of Appeals of the District of Columbia should be reviewed for the following reasons:

1. The question of the right to charge executors' commissions on stock dividends is a novel question of importance, not having been decided by this Court, by the Courts of the District of Columbia (unless inferentially in this case), or by any other Federal Court.

2. The Court below departs from its own decision in refusing to pass on the important question of law involved by holding that a bill of exceptions was necessary when the question was fully presented in the record.

3. The Court below has not given proper effect to applicable decisions of this Court by holding that a bill of exceptions was necessary when the question was fully presented in the record.

4. The effect of the decision below in allowing stock dividends violates the rules announced by this Court in *Eisner v. Macomber, supra,* and in other cases.

Wherefore petitioners respectfully pray for the allowance of a writ of certiorari to the Court of Appeals of the District of Columbia, to the end that the record in the said cause may be removed into this Honorable Court and the errors complained of may be examined and corrected and said judgment reversed.

JAMES McDONALD, JR.,
By JOHN J. HAMILTON,
Counsel.

JAMES McDONALD, 3D, AND
ALEXANDER McDONALD,
By CHARLES V. IMLAY,
Guardian ad Litem.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

JOHN J. HAMILTON.
CHARLES V. IMLAY.

BRIEF IN SUPPORT OF FOREGOING PETITION.

1. So far as the record shows, there was no evidence in the trial of the case below necessitating a bill of exceptions.

The Court below in its opinion assigns as a reason for not disposing of the question presented with reference to the right of executors to claim commissions on stock dividends the fact that no bill of exceptions was brought up in the record. So far as the record itself shows, it might be contended that no evidence was taken, as the record nowhere shows a reference to any evidence or testimony. But whether testimony was or was not taken it could not be in any way relevant to the single issue involved. Respondents in their brief (p. 5) attempted to show that they had been injured by the failure to bring into the record a statement of evidence without their showing what that statement of evidence contains. This, it is submitted, the respondents could do only by themselves reproducing the testimony. They might have made this an additional designation of record had they chosen so to do, but they did not. They might have made the alleged omission of the statement of evidence or the alleged omission of the bill of exceptions the ground of a motion to dismiss the appeal, but they did not.

For respondents now to refer to a statement of evidence is to take advantage of something not in the record, the existence of which is not shown by the record, and the substance of which they do not disclose. Petitioners cannot discuss the substance of the same without departing from the record.

2. THE ISSUE PRESENTED IS PURELY ONE OF LAW AND NOT OF FACT.

The Court below had before it in the record the Ninth and Final Account of the executors (R., pp. 34-79), the exceptions of the appellants thereto (R., p. 80), and the disposition of the exceptions by the Court (R., p. 79). The Court below in approving the account (R., p. 79) in effect overruled the exceptions. The assignments of error go to this judgment (R., p. 81). The single question of law is raised, therefore, as to the right to charge commissions on stock dividends. That the commissions claimed of $78,596.47 are based almost entirely on the stock dividends of $1,570,325.00 is evident from the summary on the first page of the account (R., p. 34). It is further evident from the language on page 65 of the account (R., p. 61), which language is quoted in the third paragraph of the opinion of this Court. It is conceded in the statement of the case by the respondents in their brief, in which they say (p. 1):

> "Such order included the approval of an allowance to the executors of a commission of $50,000 upon an increase of more than $1,500,000.00 in the principal of the estate (R., p. 79)."

The figure last named can have reference to nothing other than the stock dividends mentioned in the two pages in the account stated above.

3. WHERE THE ALLEGED ERROR IS APPARENT ON THE RECORD NO BILL OF EXCEPTIONS IS NECESSARY.

In the case of *Craighead v. Alexander*, 38 App. D. C., 229, cited by the Court below in its opinion, there had been a trial before the Court below on the caveat and testimony

had been taken on issues, among others, of mental capacity of a testatrix and undue influence practised upon her. The testimony was transcribed and made a part of this record, but there was no bill of exceptions. The Court below in its opinion (p. 234) disapproved of the failure to bring up a bill of exceptions. It was willing, however, had it not been possible to dispose of the case otherwise, to decide it without the bill of exceptions. The Court specifically disclaimed holding that a bill of exceptions would always be necessary.

On the other hand, the Court below has said several times that where the appeal involves merely questions of law, and those questions sufficiently appear on the record, no bill of exceptions is necessary. Thus in the case of *Saks v. Stinemetz Company*, 54 App. D. C., 38, the Court disposed of a writ of error from the Municipal Court of the District of Columbia in a case involving a suit for the possession of real estate in spite of the fact that there was no bill of exceptions and against a suggestion that the writ of error should be dismissed on that ground, saying (p. 40):

> "Since the questions involved sufficiently appear from the pleadings and proceedings of record, a bill of exceptions was unnecessary."

The Court of Appeals cites in connection with the above quotation its former decision to the same effect in *Evans v. Humphreys*, 9 App. D. C., 392, where a somewhat similar situation was presented and where the Court says (p. 395):

> "It is objected on behalf of the appellee that the transcript of record filed here is defective, and that it contains no bill of exceptions on which we can review the rulings of the court below in the case. But the questions raised by the appellant do not require a bill

> of exceptions. The purpose of a bill of exceptions, as has frequently been stated, is to make that a matter of record which otherwise would not appear on the record. But when the questions raised already sufficiently appear from the pleadings and proceedings of record, no such bill of exceptions is necessary. Young *v.* Martin, 8 Wall., 354; Clinton *v.* Missouri Pac. Ry. Co., 122 U. S., 469."

To the same effect was the decision of the Court of Appeals in *Gompers v. Buck's Stove and Range Company*, 33 App. D. C., 516, at page 568 (paragraph at foot of page), where the omission of a bill of exceptions was held not fatal to the appeal, but limiting the inquiry to questions of law appearing on the pleadings.

The decisions of the Supreme Court of the United States and the Circuit Courts of Appeal have uniformly held that where the error complained of appears on the face of the record no bill of exceptions is necessary. In the case of *Denver Board of Commissioners, etc., v. The Home Savings Bank*, 236 U. S., 101, at pages 103-104, the Court said:

> "The Circuit Court of Appeals declined to consider the correctness of this ruling because no exception was taken to it. But no exception or bill of exceptions is necessary to open a question of law already apparent on the record, and there is nothing in the record that indicates a waiver of the defendant's rights."

In the case of *Moline Plough Company v. Webb*, 141 U. S., 616, at page 623, the Court said:

> "In refusing judgment for the entire amount of the notes, less the admitted credits, the Court below necessarily proceeded on the ground that independently of

> any option upon the part of the plaintiff the notes became absolutely due and collectible at one or the other of the dates just mentioned and consequently the action on them was barred. If this is error, it is one apparent on the record, and need not have been presented by a bill of exceptions."

See, also case of *Wagoner National Bank v. Walch,* 164 Fed., 813; *Illinois Central Railroad v. Rodgers,* 221 Fed., 52.

Some courts have held that a bill of exceptions is not required on an appeal from decrees in probate matters where the error complained of appears on the face of the record. Thus in *Moreland v. Gillian, Administrator,* 21 Arkansas, 507, the Court said:

> "No bill of exceptions was necessary to give the Circuit jurisdiction, the error appearing upon the record of the Probate Court."

In *Tapp v. Cox,* 56 Alabama, 553, the Court said:

> "An error apparent on the face of the record the Court is bound to keep, is reviewable without a bill of exceptions."

See, also,

Hall v. Wilson, 6 Wisconsin, 425;
Matter of Jackson, 32 Hun. (N. Y.), 200.

4. QUESTION INVOLVED NOT ONE AS TO WHICH TRIAL COURT HAD DISCRETION.

Respondents in their brief and in their oral argument have attempted to make it appear that the question in the case was the usual question as to the discretion of the Court in fixing the amount of commissions and to make it so appear have

made reference to alleged testimony, the existence of which is not mentioned in the record anywhere and the substance of which they have not presented to this Court. Respondents will concede that had this been the question in the trial Court they might have no right to ask the Court of Appeals to disturb a judgment passed by the former Court in its discretion or in any event that they could not ask the Court of Appeals to pass its judgment without presentation of the complete evidence. But the language from the account quoted by the Court below in its opinion, in the third paragraph thereof, indicates that the question is not one of discretion in the Court below as to amount of commissions based on the amount of assets and the extent of services rendered.

5. THE COURT BELOW HAS IN EFFECT APPROVED COMMISSIONS ON STOCK DIVIDENDS WITHOUT ASSIGNING REASON OR DISPOSING OF ARGUMENT PRESENTED ON APPEAL.

It is respectfully submitted that the third paragraph of the opinion of the Court below (Transcript of Record, p. 86) may be cited in the future not only in this case but in other cases as a ruling by that Court that commissions on stock dividends are proper. The Court quotes the language of the executors in their claim for commissions as follows:

> "(The executors) also claim and hereby retain for their services a commission of five per cent upon profits realized on proceeds of inventoried items, and the par or face value of stocks received as dividends, viz: $1,571,929.32, or $78,596.47."

Then the Court below says:

> "The Court below, evidently after a hearing in which all pertinent facts and circumstances were

> considered, reached the conclusion that the executors were entitled to $50,000 commission on increase in principal, and made that allowance."

It is believed that this language of the Court below in its opinion may be cited or used by the parties, not only in this cause, but by parties in other causes at a future time as a decision by that Court that the commissions of executors may be assessed on stock dividends.

6. ALLOWANCE OF COMMISSIONS ON STOCK DIVIDENDS CONTRARY TO RULES LAID DOWN BY THIS COURT.

Wherever the question has been presented an attempt to tax commissions of executors or trustees on stock dividends has been denied, and there is apparently nowhere any authority to the contrary.

The right to tax a commission upon a stock dividend is flatly denied in the case of *Davidson's Estate* (1903), 204 Pa. St., 381; 54 Atlantic, 273.

The above case has been followed by later cases in Pennsylvania. For example, *Riters' Estate* (1917), 260 Pa. St., 168. This case cites with approval and follows the principle laid down in the case of Davidson's estate, that an executor is not entitled to commission on the enhanced value of stock and other investments made with money on which commission has been charged and allowed in a prior account. It has been shown above that this is a case of enhanced value of principal previously charged with commissions.

In the recent case of *Eisner v. Macomber* (1920), 252 U. S., 189, in considering the nature of stock dividends for the purpose of taxation as income, this Court, in holding

that stock dividends are not subject to taxation as income, indicates a view that they are to be considered no addition to the wealth of the stockholder. It holds that they constitute dilution of the value of the shares originally held by the stockholders, and that to the extent that stock dividends are distributed among other stockholders the original shares of the stockholder in question become less valuable in the sense that he is entitled to less as a *pro rata* interest in the assets of the corporation. This Court says in this connection (p. 211):

> "The essential and controlling fact is that the stockholder has received nothing out of the Company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholder's in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment."

Instead of a stock dividend adding to the stockholders's property it detracts from it, as stated in 7 R. C. L., page 289, thus:

> "A stock dividend does not add to the stockholder's ready cash, but it changes the form of his investment by increasing the number of his shares, thereby diminishing the value of each share and leaving the aggregate value of all his stock substantially the same."

In the decision of *Eisner v. Macomber* this Court refers with approval to the case of *Gibbons v. Mahon* (1890), 136 U. S., 549; 34 L. Ed., 525. This case arose in the District of Columbia Supreme Court June, 1885, and reported in 4 Mackey, 130. The testatrix in the case had left, among other property, 280 shares of the stock of the Washington Gas Light Company to a trustee in trust for the complainant for the latter's lifetime, principal thereof afterwards to go to another. After the death of the decedent, in view of the fact that the plant of the gas company had accumulated to double its original value, with the aid of an act of Congress, the gas company doubled its stock, issuing to the trustee an additional 280 shares as stock dividends. The complainant claims these new shares as income, the remainderman as *corpus*.

In denying the claim of the life tenant and sustaining the claim of the remainderman, Mr. Justice James says (p. 137):

> "We are of the opinion that these new shares were simply representatives of the interest that the trustee already had in the *corpus*. They were not, in any sense, a dividend. They came into her hands in trust just as the old shares came into her hands; and, as we have said, are in fact, but an additional representative of a corpus, which before this issue, was represented by the original shares of stock. The life legatee is entitled to receive, therefore, only the dividends declared on all of these five hundred and sixty shares. The *corpus* itself is held by the trustee for the benefit of the remainderman."

When the case came into this Court the latter, in an exhaustive review of the subject and the authorities, sustained

the lower Court. Mr. Justice Gray says (136 U. S., 559, 560):

> "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interests of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."

And later in the opinion (p. 566) the following language from *Williams v. Western Union Telegraph Company* (1883), 93 N. Y., 162, is quoted with approval:

> "After a stock dividend a corporation has just as much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property but simply dilutes the shares as they existed before."

For the reasons thus urged it is submitted that a writ of certiorari should be granted.

Respectfully submitted,

M. M. ALLISON,
JOHN J. HAMILTON,
Counsel for James McDonald, Jr.
CHARLES V. IMLAY,
Guardian ad Litem and Counsel for James McDonald, 3d, and Alexander McDonald, Infants.

[Endorsed:] James McDonald, Jr., and James McDonald, III, and Alexander McDonald, infants, by their guardian *ad litem*, Charles V. Imlay, petitioners, *vs.* Lawrence Maxwell and Fulton Trust Company, executors, respondents. Petition for writ of certiorari and supporting brief. M. M. Allison, John J. Hamilton. Law offices of Charles V. Imlay, Kellogg Bldg., 1416 F. Street, Washington, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 147.

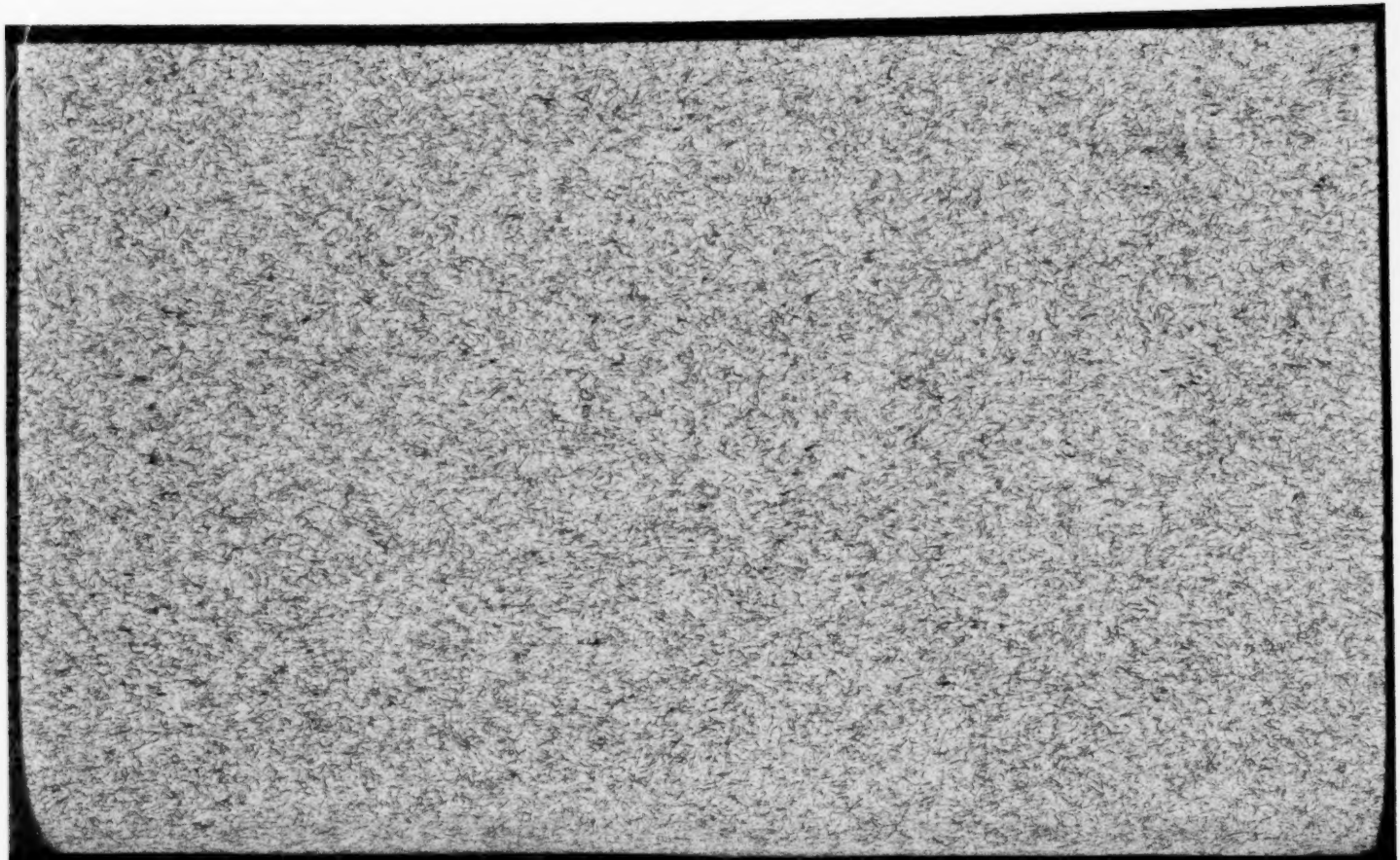
JAMES McDONALD, JR., AND JAMES McDONALD III AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

BRIEF FOR INFANT PETITIONERS.

CHARLES V. IMLAY,
CHARLES E. WAINWRIGHT,
Counsel for Petitioners, James McDonald III and Alexander McDonald, Infants.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 147.

JAMES McDONALD, JR., AND JAMES McDONALD III AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS (APPELLANTS BELOW),

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS, RESPONDENTS (APPELLEES BELOW).

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR INFANT PETITIONERS.

Official Reports of the Opinions Below.

No opinion was rendered by the trial court, the Supreme Court of the District of Columbia, except the comment in its order not reported, but set forth in full in the record (p. 99).

The opinion of the Court of Appeals of the District of Columbia (R., 103-104) is reported in 53 W. L. R., 541; 6 Fed. (2d), 678.

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked.

(1) The judgments to be reviewed are that of the Supreme Court of the District of Columbia, dated August 22, 1924 (R., 99), and that of the Court of Appeals of the District of Columbia, dated May 4, 1925.

The petition for a writ of certiorari was filed June 19, 1925, and the petition was granted October 12, 1925 (R., 106).

(2) The jurisdiction of this Court is based upon Section 240a of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat., 936; Fed. Stat. An. 1925 Supp., p. 84) and Rule 35, 5c of the Revised Rules of this Court adopted June 8, 1925; in particular that part of the rule citing as one of the cases for granting a writ of certiorari a case where the lower court "has not given proper effect to an applicable decision of this Court."

I.

Statement of the Case.

The object of this proceeding is to obtain a review of a judgment of the Court of Appeals of the District of Columbia, dated May 4, 1925 (R., 105), affirming a judgment of the Supreme Court of the District of Columbia dated August 22, 1925 (R., 99), allowing to Lawrence

Maxwell and the Fulton Trust Company, Executors of the Estate of James McDonald, deceased, in connection with their Ninth and Final Account a commission of $50,000.00 on an alleged increase of principal represented by stock dividends of the Standard Oil Company of New Jersey and subsidiary companies.

James McDonald died in the District of Columbia January 13, 1915, leaving a last will and testament dated June 26, 1913, and a codicil thereto dated April 14, 1914 (R., 1-10). The executors named in the will, Lawrence Maxwell and The Fulton Trust Company, thereafter filed in the Probate Court of the Supreme Court of the District of Columbia a petition for probate of the will and codicil and for letters testamentary (R., 10-12). By an order of the Court dated January 20, 1915 (R., 12), said will and codicil were duly admitted to probate and the said executors thereupon began the administration of the estate.

James McDonald left one child, James McDonald, Jr., and two grandchildren, James McDonald III and Alexander McDonald, the three petitioners herein. James McDonald III was born September 10, 1913, and Alexander McDonald was born May 12, 1915, said infants now being respectively sixteen and fourteen years old. The interests of the infants arise under Paragraphs M and N of the testator's will (R., 5-6), making them remaindermen with their father, James McDonald, Jr., in the residue of the principal and accumulated income, and because of such interests of said infants the guardian *ad litem* was appointed by an order of the Court in 1917 and reappointed under

a subsequent order of December 5, 1918 (R., 13). The equity suit referred to in the report of the guardian *ad litem* (R., 15) has resulted in a decree modifying the paragraphs of the will mentioned. *James McDonald, Jr., vs. Lawrence Maxwell et al., exrs., et als.*, 54 W. L. R., 624; 12 Fed. (2d), 822, decided by the Court of Appeals of the District of Columbia May 3, 1926. But it is still true that the children are affected equally with their father in any diminution of principal or interest by administration cost. The first order mentioned appointing the guardian *ad litem* was passed at the time of the presentation of the Third Account, when the first claim for a commission was made. At that time a commission of $200,000.00 was allowed on principal of the estate, being 5 per cent of approximately $4,000,000.00. From this time on until the filing of the Ninth and Final Account, various claims for commission were made by the executors, and allowed on both income and principal, according to the following table (R., 20):

Accounts.	Date.	On principal.	On income.
3rd	1917....	$200,000 00	None.
4th	1918....	None	$10,085 00
5th	1919....	None	9,119 00
6th	1920....	12,415 00	11,108 00
7th	1921....	4,017 00	10,628 00
8th	1922....	1,732 00	10,037 00
9th	1923....	50,000 00	12,390 00

From this table it is seen that a commission was paid to the executors on all principal, as well as income, up to the Ninth and Final Account, and this necessarily

means that the executors, prior to the filing of the latter account, had been paid a commission on the balance of principal of $2,467,073.92 carried over from the Eighth to the Ninth Account, as shown by the summaries at the beginning of the latter (R., 42).

In the same summary of principal (*Ibid.*), the respondent executors set up two alleged additions to principal, viz: (1) profit on inventoried items, $1,604.32, and (2) stock dividends amounting to $1,570,325.00. No objection is made to the smaller item; the objection of petitioners to the treatment of the stock dividends as addition to principal constitutes the basis of petitioners' allegations of error in the trial court and the Court of Appeals below. For it is upon the basis of these large stock dividends (and upon the small item first mentioned above) that the executors claimed elsewhere in their Ninth Account (R., 77) a commission of $78,596.47, that is, five per cent of $1,571,929.32 ($1,604.32 plus $1,570,325.00), which was reduced by the trial court to $50,000.00. These stock dividends were received during the accounting year from July, 1922, to July, 1923, from the Standard Oil Company of New Jersey and its subsidiary companies. The total value named is the sum of the par values, as itemized in the account (R., 46-47).

It should be noted that the executors asked and were allowed a commission of five per cent on additions to income of $247,814.39, amounting to $12,390.72 (R., 43, 82). No request was, of course, made for commissions on $808,685.75, the balance of income carried over from the preceding account (R., 43), for the above

table indicates that this amount had been taxed with commissions in previous accounts.

No exceptions were filed by these petitioners in the trial court to the allowance of commissions on income. Exceptions were, however, filed to the requested allowance of commissions on the alleged additions to principal. The grounds of these exceptions appear in the report filed by the guardian *ad litem* (R., 21-23, 40) and in the exceptions filed by petitioner James McDonald (R., 40). They presented the issue here involved as to whether or not stock dividends may properly be treated as an addition to principal for the purpose of computing commissions.

The trial justice disposed of the exceptions by passing an order approving the account and stating "the executors being allowed $12,390.72 commission on income, as claimed, but being hereby allowed $50,000.00 commission *on increase in principal*, instead of $78,596.47 claimed" (R., 99). The words in supplied italics, petitioners submit, can have reference to nothing but the alleged increase in principal involved in the stock dividends (and the other small item) for elsewhere in the account (R., 77) the executors make their claim of $78,596.47 refer specifically to a calculation of five per cent upon "profits realized on inventoried items, and the par or face value of stocks received as dividends, viz, $1,571,929.32" (the sum of the two figures of $1,604.32 and $1,570,325.00 mentioned before (R., 42)).

From the above decision petitioners appealed to the Court of Appeals of the District of Columbia, urging

in their Assignments of Error (R., 100) that the trial court erred as a matter of law in allowing any commissions on the stock dividends. The Court of Appeals in its decision sustains the lower court, holding that the question presented in appellants' assignments was not properly before them because the case depended upon facts not properly presented for want of a bill of exceptions, thus treating the case as one depending upon facts not before the Appellate Court.

That the executors are entitled to commissions on both principal and income is not denied, for under Section 361 of the Code of the District of Columbia commissions are allowable on "the inventory or inventories." But petitioners submit that stock dividends are neither an addition to the principal nor to income, and are improperly listed in the account as additions to principal (R., 46-47). Nor, as the record of the case now stands, is any objection made to the rate of five per cent upon which the commission was computed, for the same section permits the court in its discretion to fix a rate from one to ten per cent. The contention of petitioners is that, at whatever rate fixed, a commission on stock dividends is improper. The case then, on its merits, presents the single question whether or not commissions are allowable to executors on stock dividends.

II.

Specification of Errors Intended to be Urged.

The petitioners submit that the Court of Appeals erred as follows:

(1) In holding that no question was presented for decision in the absence of a Bill of Exceptions;

(2) In refusing to reverse the judgment of the Supreme Court of the District of Columbia in allowing a commission of $50,000.00 on an alleged increase in principal in addition to commissions allowed on income.

(3) In deciding inferentially that commissions are allowable on stock dividends.

(4) In allowing what is, in effect, double commissions by permitting commissions on principal already charged with commissions in former accounts.

III.

ARGUMENT.

Summary.

Petitioners will present their argument upon the specifications of error in their order as follows:

(1) ALLEGED ERRORS BEING APPARENT ON FACE OF RECORD, NO BILL OF EXCEPTIONS WAS NECESSARY (Specification (1)).

(2) COMMISSION NOT ALLOWABLE ON STOCK DIVIDENDS (Specification (2)).

This proposition supported by two analogies:

(*a*) Stock Dividends not Income for the Purpose of Income Tax Law.

(*b*) Stock Dividend Treated as Part of Original Corpus of Estate as Between Life Tenant and Remainderman.

(3) COURT BELOW HAS INFERENTIALLY DECIDED THAT COMMISSIONS ARE ALLOWABLE ON STOCK DIVIDENDS (Specification (3)).

(4) COMMISSIONS NOT ALLOWABLE TWICE ON SAME ASSETS (Specification (4)).

(1) ALLEGED ERRORS BEING APPARENT ON FACE OF RECORD, NO BILL OF EXCEPTIONS WAS NECESSARY (Specification of Error (1)).

The court below in its opinion assigns as a reason for not disposing of the question presented with reference to the right of executors to claim commissions on stock dividends, the fact that no bill of exceptions was brought up in the record. In so holding, the Court of Appeals assumes that evidence was "adduced at the trial" (R., 104) and that this evidence was material to the question involved on the appeal, for the opinion below refers to "facts and circumstances" not before the appellate court (*Ibid*). So far as the record itself shows, it might be contended that no testimony was taken, as the record nowhere shows a reference to any testimony. But, conceding that testimony was taken, it could not be relevant to the single question of law concerning the right to charge any fee on stock dividends. The language of the opinion of the Court of Appeals seems to presuppose that the reasonableness of the commission claimed is in issue. Were that true,

testimony as to the extent of the executors' services would be material. But petitioners submit that no question of reasonableness is involved, but only the single question as to whether any commission is chargeable at all.

It will be noted that respondents did not offer to bring any testimony into the record in the court below, or to make the failure on the part of the petitioners to produce the same or a bill of exceptions the ground of a motion to dismiss the appeal. For respondents now to refer to a statement of evidence is to take advantage of something not in the record, the existence of which is not shown by the record, and the substance of which they do not disclose.

The court below had before it in the Record the Ninth Account of the executors (R., 42-99), and the exceptions of the appellants thereto (R., 21-22, 40-41), accompanied by a full discussion of the history of the case in the report of the guardian *ad litem* (R., 14-41), to which no traverse was made. The court below also had before it the disposition of the exceptions by the trial court (R., 99), which was, in effect, to overrule the exceptions, although the amount of the commissions claimed was reduced. The assignments of error in the Court of Appeals go to this judgment (R., 100). The single question is raised, therefore, as to the right to charge commissions on stock dividends. That the commissions claimed of $78,596.47 are based almost entirely on stock dividends of $1,579,325.00 is evident from the summary on the first page of the account (R.,

42). It is further evident from the language on page 61 of the account (R., 77), which language is quoted in the third paragraph of the opinion of the Court of Appeals (R., 104).

In the case of *Craighead vs. Alexander*, 38 App. D. C., 229, cited by the court below in its opinion, there had been a trial on a caveat to a will, and testimony had been taken on issues, among others, of mental capacity of a testatrix and undue influence practised upon her. The testimony was transcribed and made a part of the record, but there was no bill of exceptions. The court below in its opinion (p. 234) disapproved of the failure to bring up a bill of exceptions. It was willing, however, had it not been possible to dispose of the case otherwise, to decide it without the bill of exceptions. The court specifically disclaimed holding that a bill of exceptions would always be necessary.

On the other hand, the court below has said several times that where the appeal involves merely questions of law, and those questions sufficiently appear on the record, no bill of exceptions is necessary. Thus in the case of *Saks vs. Stinemetz Company*, 54 App. D. C., 38, the court disposed of a writ of error from the Municipal Court of the District of Columbia in a case involving a suit for the possession of real estate in spite of the fact that there was no bill of exceptions and against a suggestion that the writ of error should be dismissed on that ground, saying (p. 40):

> "Since the questions involved sufficiently appear from the pleadings and proceedings of record, a bill of exceptions was unnecessary."

The Court of Appeals cites in connection with the above quotation its former decision to the same effect in *Evans vs. Humphreys*, 9 App. D. C., 392, where a somewhat similar situation was presented, and where the Court says (p. 395):

> "It is objected on behalf of the appellee that the transcript of record filed here is defective, and that it contains no bill of exceptions on which we can review the rulings of the court below in the case. But the questions raised by the appellant do not require a bill of exceptions. The purpose of a bill of exceptions, as has frequently been stated, is to make that a matter of record which otherwise would not appear on the record. But when the questions raised already sufficiently appear from the pleadings and proceedings of record, no such bill of exceptions is necessary. Young *v.* Martin, 8 Wall., 354; Clinton *v.* Missouri Pac. Ry. Co., 122 U. S., 469."

To the same effect was the decision of the Court of Appeals in *Gompers vs. Buck's Stove and Range Company*, 33 App. D. C., 516, at page 568 (paragraph at foot of page), where the omission of a bill of exceptions was held not fatal to the appeal, but limiting the inquiry to questions of law appearing on the pleadings. To the same effect also is *Raymond vs. United States*, 26 App. D. C., 250, 256.

But the court below, it is submitted, not only departed from its own decisions, but failed to give effect to applicable decisions of this Court.

The decisions of the Supreme Court of the United States and the Circuit Courts of Appeals have uniformly held that where the error complained of appears on the face of the record, no bill of exceptions is necessary. In the case of *Denver Board of Commissioners, etc., vs. The Home Savings Bank*, 236 U. S., 101, at pages 103-104, this Court said:

> "The Circuit Court of Appeals declined to consider the correctness of this ruling because no exception was taken to it. But no exception or bill of exceptions is necessary to open a question of law already apparent on the record, and there is nothing in the record that indicates a waiver of the defendant's rights."

In the case of *Moline Plough Company vs. Webb*, 141 U. S., 616, at page 623, the Court said:

> "In refusing judgment for the entire amount of the notes, less the admitted credits, the Court below necessarily proceeded on the ground that, independently of any option upon the part of the plaintiff, the notes became absolutely due and collectible at one or the other of the dates just mentioned, and consequently the action on them was barred. If this is error, it is one apparent on the record, and need not have been presented by a bill of exceptions."

To the same effect also are the cases of *Wagoner National Bank vs. Welch*, 164 Fed., 813; *Illinois Central Railroad vs. Rodgers*, 221 Fed., 52.

Some courts have held that a bill of exceptions is not required on an appeal from decrees in probate matters

where the error complained of appears on the face of the record. Thus in *Moreland vs. Gillian, Administrator,* 21 Ark., 507, the Court said:

> "No bill of exceptions was necessary to give the Circuit jurisdiction, the error appearing upon the record of the Probate Court."

In *Tapp vs. Cox,* 56 Ala., 553, the Court said:

> "An error apparent on the face of the record the Court is bound to keep, is reviewable without a bill of exceptions."

(2) COMMISSION NOT ALLOWABLE ON STOCK DIVIDENDS (Specification of Error (2)).

Wherever the question has been presented as between executors and an estate, an attempt to tax commissions of executors on stock dividends has been denied; and there is apparently nowhere any authority to the contrary.

The right to tax a commission upon a stock dividend is flatly denied in the case of *Davidson's Estate* (1903) 204 Pa. St., 381; 54 Atlantic, 273.

The above case has been followed by later cases in Pennsylvania. For example, *Riters' Estate* (1917), 260 Pa. St., 168. This case cites with approval and follows the principle laid down in the case of *Davidson's Estate:* that an executor is not entitled to commission on the enhanced value of stock and other investments made with money on which commission has been charged and allowed in a prior account. It has been

shown above that this is a case of enhanced value of principal previously charged with commissions.

The principle upon which these cases proceed is plainly that stock dividends are not an addition to either the principal or income of an estate. And while there are apparently no cases in the courts of the District of Columbia, or in this Court, passing specifically on the right to charge commissions on stock dividends, there are controlling decisions in closely analogous cases which sustain the principle that commissions cannot be so charged.

a. *Stock Dividends not Income for the Purpose of Income Tax Law.*

In the recent case of *Eisner vs. Macomber* (1920), 252 U. S., 189, in considering the nature of stock dividends for the purpose of taxation as income, this Court, in holding that stock dividends are not subject to taxation as income, indicates a view that they are to be considered no addition to the wealth of the stockholder. It holds that they constitute dilution of the value of shares originally held by the stockholders, and that to the extent that stock dividends are distributed among other stockholders the original shares of the stockholder in question become less valuable, in the sense that he is entitled to less as a pro rata interest in the assets of the corporation. This Court says in this connection (p. 211):

> "The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and

> benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance, and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment."

Instead of a stock dividend adding to the stockholder's property it detracts from it, as stated in 7 R. C. L., p. 289, thus:

> "A stock dividend does not add to the stockholder's ready cash, but it changes the form of his investment by increasing the number of his shares, and leaving the aggregate value of all his stock substantially the same."

b. *Stock Dividend Treated as Part of Original Corpus of Estate as Between Life Tenant and Remainderman.*

In the decision of *Eisner vs. Macomber, supra*, this Court refers with approval to the case of *Gibbons vs. Mahon*, (1890), 136 U. S., 549. This case arose in the District of Columbia, where it was first decided in the District of Columbia Supreme Court, June, 1885, and reported in 4 Mackey, 130. The testatrix in the case had left among other property 280 shares of the stock of the Washington Gas Light Company to a trustee in

trust for the complainant for the latter's lifetime, principal thereof afterwards to go to another. After the death of the decedent, in view of the fact that the plant of the Gas Company had accumulated to double its original value, with the aid of an Act of Congress the Gas Company doubled its stock, issuing to the trustee an additional 280 shares as stock dividends. The complainant claims these new shares as income, the remainderman as *corpus*.

In denying the claim of the life tenant and sustaining the claim of the remainderman, Mr. Justice James says (p. 137):

> "We are of the opinion that these new shares were simply representative of the interest that the trustee already had in the *corpus*. They were not, in any sense, a dividend. They came into her hands in trust just as the old shares came into her hands; and, as we have said, are, in fact, but an additional representative of a *corpus*, which, before this issue, was represented by the original shares of stock. The life legatee is entitled to receive, therefore, only the dividends declared on all of these five hundred and sixty shares. The *corpus* itself is held by the trustee for the benefit of the remainderman."

When the case came here, this Court, in an exhaustive review of the subject and the authorities, sustained the lower court. Mr. Justice Gray says (136 U. S., 559, 560):

> "A stock dividend really takes nothing from the property of the corporation, and adds noth-

> ing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interests of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."

And later in the opinion (p. 566) the following language from *Williams vs. Western Union Telegraph Company* (1883), 93 N. Y., 162, is quoted with approval:

> "After a stock dividend a corporation has just as much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property, but merely dilutes the shares as they existed before."

In discussing the rights to stock dividends as between life tenant and remainderman, it is said in *Taylor on Private Corporations*, pp. 800-801:

> "Usually to speak of a 'stock dividend' involves in reality a contradiction in terms. A dividend is a distribution of profits. * * * But when a corporation has accumulated profits and declares a 'stock dividend' just what the corporation does not do is to declare a dividend. A 'stock dividend' is no dividend, no real distribution, either of profit or capital; but merely an increase in the number of shares into which the capital is divided."

The same question is decided to the same effect but from another angle in *Boardman vs. Mansfield* (1907), 79 Conn., 634, in which the court says (p. 641):

> "Whenever, therefore, as the result of a stock issue of whatever form, nothing is by the corporation separated from the corporate assets to pass out, or which at the option of the shareowners may pass out, from the dominion of the corporation into that of the shareowners, no condition is created which permits of a life tenant receiving anything in hand which is not inevitably subtracted from that which, in the possession of the trustee, represents ownership in the corporation, and nothing else,—from that, therefore, which under our law is the *corpus* of the trust estate."

A special rule for taxing the commissions of trustees on stock dividends as between life tenant and remainderman was announced in the case of *Re Accounting of James W. Osborne, Exr., etc.* (1913), 209 N. Y., 450, 484; 50 L. R. A. (N. S.), 510.

In the case cited the trustee under a will had re-

ceived 3,000 shares of stock of the Singer Manufacturing Company. The capital stock of that company at the date of the death of the testator was $30,000,000. On that day it had a surplus of accumulated earnings arising exclusively from the business of the company amounting to $37,604.26. Following the death of the testator this surplus had increased to $51,560,757. The Company thereupon declared a stock dividend, which gave to the trustee, as the successors of the decedent, together with other stockholders, the same number of shares as owned by him previously, thus doubling the amount of stock held by him. The New York Court of Appeals was called upon in the case to decide as between the life tenant and the remainderman as to the disposition of the stock dividends so declared. The opinion of the court in the first instance is taken up with a discussion of this phase of the question. The decision on that point is: that so much of a stock dividend declared by a corporation, a part of whose stock is held in trust for life tenant and remainderman, out of surplus earnings, as was accumulated after the creation of the trust, goes to the life tenant, and the balance to the remainderman. This decision has been said by an annotation of the case (50 L. R. A. (N. S.), 511) to be a "new departure" which "practically overrules" prior New York cases.

The matter was again presented in the form of motions to amend a *remittitur* and on December 16, 1913, these motions were disposed of in 209 N. Y., 484; 50 L. R. A. (N. S.), 530. One of the motions was that of the trustee to obtain the authority of the court to sell

part of the stock dividends referred to above for the purpose of paying commissions to the trustee thereon.

The court says in this connection:

> "So far as the stock dividend is retained in the *corpus* of the estate, the trustee is not entitled to commissions thereon. The very purpose of our decision is to make the *corpus* of the trust fund have exactly the same value after the division of the dividend as when the trust was originally created, and on which the trustee has received his commissions. So far as the trustee is entitled to commissions on the amount awarded to the life beneficiary, which award, of course, is to be considered as income, it can be adjusted with such beneficiary, or application therefor can be made to the surrogate."

The rule announced as to the distribution of stock dividends as between life tenant and remainderman is at variance with the rule of this Court laid down in *Gibbons vs. Mahon, supra,* where this Court plainly held that the stock dividends were merely another representation of the *corpus,* that is, neither income for the life tenant nor new principal for the remainderman. And this difference in view will prompt this Court, it is believed, to reject the principle of the *Osborne* case in the quoted language above in allowing any commission whatever.

If, however, the principles of the *Osborne* case had not been decided differently in this Court, it is submitted that on this record the *Osborne* case would have no persuasive effect, because the executors here make

no claim other than that the stock dividends are a part of the *corpus*. They are clearly listed under the "Principal Account" (R., 46-47). The original shares, less what has been disposed of in the course of administering the estate over a period of eight years, are carried forward as part of the balance from the preceding account at the original appraised value, and the stock dividends are listed at their par value. This appraised value is shown in detail in the Report under Rule 18 of the Probate Rules of the lower court (R., 83-90), showing the value at the time of inventory, which was presumably at the beginning of the administration in 1915. Furthermore, these stock dividends were all received in the accounting year covered by the Ninth Account from July, 1922, to July, 1923 (R., 46-47), and presumably could not have been based on earnings created prior to the creation of the trust upon testator's death in January, 1915.

Petitioners submit that the proper method of listing the stock dividends would be to take the appraised values at the date of the Ninth Account, both of the remaining original stocks and the new shares received as dividends. If these appraised values of both would indicate an increase over the appraised value of the original stock, this increase would constitute a profit on inventoried items similar in kind to the small item of $1,604.32 (R., 42), hereinbefore mentioned. With the question presented in this way the trial court, it is submitted, should have proceeded to consider the question as to whether or not any commission should be allowed on principal, having in mind the doctrine of the

Court of Appeals laid down in the case of *Caldwell vs. Hopkins, Admx.* (1920), 49 App. D. C., 332, upon the authority of which it might have been decided that no commission should be granted. But even if the lower court should have considered that case not applicable and that further commissions on increases of principal should be allowed, it should have proceeded to ascertain a proper commission on the actual excess value demonstrated in the light of the services rendered. Then, and only then, would the question of the determination of the extent of the services rendered by the executors be relevant. It is submitted that the Court of Appeals erred in assuming that this question of fact was open (R., 104). This comparison of the former appraisement of the original stocks with a present appraisement of the original stocks plus the stock dividends is the only sound method of demonstrating what real addition, if any, there is to the principal. The method is tacitly admitted by the executors in setting up the smaller item of $1,604.32 (R., 42) as a profit on inventoried items.

It will not be denied by these petitioners that the par value of the stock dividends is, with perhaps only one exception, less than the real market value of same at the time of the issuance of the stock dividends, nor that the market values thereof are in many instances much greater than the par values. The table (R., 25) in the report of the guardian *ad litem* shows that the market value is generally larger and in many instances much larger. But this method of comparison does not reveal any addition to the value of the principal coming from

the stock dividends, and a mere display of the sale prices before and after the issuance of stock dividends does not. Where prices fluctuate, as they do in the stocks of this type, they do not accurately show what is the effect of the change and what is not.

Certainly, it is true that, generally speaking, the issuance of the stock dividends brought the prices of the original stocks down. A study of the tables of 1922 and 1923 prices of stocks in question, compiled by the guardian *ad litem* in his report (R., 30-31) show that in cases of some of the more important holdings the drop in prices is almost identical with the ratio of dilution by stock dividends. Thus, in the case of the stock of the Atlantic Refining Company, the high and low prices, $1,575 and $900, of 1922 fell, after a 900 per cent stock dividend, to $160 and $100 in 1923. But where similar comparisons in tables do not show so clearly a drop in price as an effect of the dilution, it does not prove that the diluted stock is worth more as a result of the issue of stock dividends. There is a wide fluctuation of high and low prices in 1922, and a similar wide fluctuation in 1923. The high and low prices for the two years are averages over the year. In a number of instances, e. g., in the cases of the Ohio Oil Company, and the various Standard Oil Companies, a decrease in the par value of the stock from $100.00 to $25.00 came either shortly before or at the same time as the stock dividend.

These matters are apparent from the table already referred to of the par and market values of the stocks in question at the time stock dividends were issued

(R., 25) and from a study of the individual stocks as they are set up in the "Income Account" in the Ninth Account (R., 47-63). The amount of the stock dividend is indicated in the latter pages by the larger numbers of dividends in later periods over the smaller numbers in former periods.

It is impossible to show, it is submitted, by anything in the record that there has been in fact any new value added as a result of the issuance of the stock dividends. It cannot therefore be shown that the stock dividends in this case differ in effect from stock dividends in the usual case.

(3) COURT BELOW HAS DECIDED INFERENTIALLY THAT COMMISSIONS ARE ALLOWABLE ON STOCK DIVIDENDS (Specification of Error (3)).

Although the court below declines to pass upon the objection raised by petitioners that commissions are not properly allowable on stock dividends, it nevertheless embodies in its opinion (R., 104) the following language:

> "In this account the aggregate value of the estate is shown to be almost $5,000,000, and the executors, in addition to the claim for commission on income collected since the preceding account, 'also claim and hereby retain for their services a commission of five per cent upon profits realized on proceeds of inventoried items, and the par or face value of stocks received as dividends, viz: $1,571,929.32,' or $78,596.47. The court below, evidently after a hearing in

> which all pertinent facts and circumstances were considered, reached the conclusion that the executors were entitled to $50,000 commission on increase in principal and made that allowance."

It is submitted that this language may be interpreted as a tacit recognition of the lawfulness of charging executors commissions on stock dividends. The only way in which this inference can be avoided, it is submitted, is to reverse the judgment of the court below.

(4) COMMISSIONS NOT ALLOWABLE TWICE ON SAME ASSETS.

If the court adopts the view that stock dividends are not a real addition to principal the allowance of a commission on the same amounts to the allowance of a double commission on the same asset, which is uniformly disapproved by the authorities.

So the law is laid down in 24 C. J., p. 978.

> "Where the representative renders more than one account, commissions cannot be allowed, on a second or subsequent account, on assets included in a prior account and on which commissions have been already allowed."

In *Davidson's Estate* (*supra*), the executors charged commission in a final account on an inventory of the estate which included certain stocks purchased with money of the estate on which money the executor had already been paid a commission of 5 per cent prior to the final account. The auditor found that prior to the

final account the executor had charged a commission of 5 per cent, and that this stock, purchased with funds of the estate, was merely assets of the estate in another form on which the executor had already received a commission.

A commission was charged in the final account on certain stock dividends which had been paid by the company as a result of the investment of the money of the estate. The auditor disallowed a commission on this stock because these shares of stock were an increase in the assets of the estate due to the business management of the compa ies in which stock was held, and not to the business sagacity or responsibility of the executor.

The court held (p. 385):

> "The auditor reported that there had been no litigation in the settlement of the estate, and that the main duty performed by the executor was the collection of the income from investments made by decedent. For these services he has already received over $45,000 (the amount of the estate was $245,136.82). Some of the largest items in the account on which commissions were claimed were the result of appreciation in the value of the stocks and other investments made with money on which commissions had been charged and allowed in a prior account.
>
> "These findings are practically undisputed and they fully sustain the conclusion of the auditor that the account has received ample compensation."

The case has thus been cited for the proposition that an executor is not entitled to commissions on an enhanced value of stocks and other investments made with money on which commissions have been charged in a prior account.

The doctrine of *Davidson's Estate* was upheld on this point in the subsequent case of *Riters' Estate* (*supra*), in which the principle of the former case was cited with approval, the court laying down the rule that an executor is not entitled to commissions on enhanced value of stocks and other investments made with money on which commissions had been charged and allowed in a prior account.

In another Pennsylvania case, *McCausland's Appeal*, 38 Pa. St. Rep., 466, the trustees claimed a commission on money invested by the testator, which investment had never been changed by the trustee. The court allowed a commission of 5 per cent on the interest, stating (p. 470):

> "Commissions are given as a compensation for labor and responsibility, and when neither the one has been performed nor the other incurred, there is nothing to be compensated."

In *Kennedy vs. Dickey* (1904), 99 Md., 295, the trustees claimed a commission upon a part of the estate on which they had already charged a commission. In disposing of the exceptions thereto the court said (p. 298):

> "The court below decided that to allow commissions on this account now would be to subject the corpus of the estate to two commissions,

> which was never done in that court. This seems to be in conformity with well established principles. * * * For the collection of accruing interest they were entitled to receive commissions, to compensate them for their trouble and expense. If services had been rendered for the collection of the corpus the court had power to make an allowance out of the fund. But there is no evidence in the record that the trustees ever did more than hold the securities and collect the interest."

A similar objection was made to another request for an allowance, in disposing of which the court said (p. 302):

> "In reference to this objection, we will not repeat what has been elsewhere said as to commissions on the corpus of the estate. As to those amounts upon which the trustees have already received commissions in their capacity as executors, or as trustees, no other commissions can be allowed. In respect to the residue of the fund, they do not seem to have been put to any labor or trouble whatever."

Conclusion.

In the final analysis it is believed that an attempt to set up a stock dividend as an addition to the principal of this estate is not different from an attempt to argue that a pie is increased by being cut into several pieces. If one can show that the smaller pieces of pie will sell for more in the aggregate than the pie as an entirety, there may be an addition to its value by its

cutting; it is not shown here that the larger number of shares of stock after dilution are worth more than the original shares, before dilution. The case is not shown to be different from the situation in the numerous authorities cited where it is held that stock dividends are not an addition to either principal or income.

Inasmuch, then, as commissions on stock dividends have been denied in those cases where the question has been specifically raised; since this doctrine has the support of clear analogies in the treatment of stock dividends in other connections; and since the requested allowance here would amount to a double allowance of commissions on the same assets, it is believed that the order of the court below allowing the commission of $50,000 should be reversed.

Respectfully submitted,

CHARLES V. IMLAY,
CHARLES E. WAINWRIGHT,
For Petitioners James McDonald, III, and Alexander McDonald, Infants.

Office Supreme Court, U. S.
FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 147.

JAMES McDONALD, JR., AND JAMES McDONALD III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

BRIEF OF INFANT PETITIONERS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

CHARLES V. IMLAY,
CHARLES E. WAINWRIGHT,
Counsel for Petitioners, James McDonald III and Alexander McDonald, Infants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 147.

JAMES McDONALD, JR., AND JAMES McDONALD III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS (APPELLANTS BELOW),

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS, RESPONDENTS (APPELLEES BELOW).

BRIEF OF INFANT PETITIONERS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The petitioners, James McDonald III, and Alexander McDonald, infants, by Chadles V. Imlay, guardian *ad litem*, pray that the motions filed by respondents to dismiss or affirm be overruled for the reasons hereinafter set forth.

I.

Alleged Errors Apparent on Record.

The first ground urged by respondents in support of their motion to dismiss the writ of certiorari granted in this case and affirm the judgment of the Court of Appeals of the District of Columbia is an alleged absence of record. It will be noted that no claim is made that the printed record here is not a complete record of the proceedings in the Court of Appeals: the allegation is that there is no bill of exceptions from the trial court, the Supreme Court of the District of Columbia, on the appeal to the Court of Appeals of the District of Columbia. But whether or not the Court of Appeals correctly ruled that such a bill of exceptions was necessary is one of the substantial points involved in this case. Petitioners submit that without a bill of exceptions the record discloses in the account of the executors (R., 42-99), the exceptions of the petitioners thereto (R., 21-22, 40-41), and the order of the trial court in overruling the same the error of the trial court on the merits of this case in treating stock dividends as an increase in value for determining commissions of executors. Petitioners contend that the Court of Appeals in its opinion and judgment (R., pp. 103-105) departed from applicable decisions of this Court, both in its holding that a bill of exceptions from the trial to the appellate court was necessary, and in its refusing to rule that commissions on stock dividends were not allowable but by implication deciding to the contrary.

In the petition for the writ of certiorari (pp. 8-9; 13-16) petitioners contended that the case is one in which the alleged error is apparent on the face of the record, in which case a bill of exceptions is unnecessary. References were made in support of this proposition not only to cases in the Court of Appeals (*Evans vs. Humphreys*, 9 App. D. C., 392; *Gompers vs. Bucks Stove and Range Company*, 33 App. D. C., 516, 568) but to two cases in this Court, viz: *Denver Board of Commissioners, etc., vs. The Home Savings Bank*, 236 U. S., 101, 103-104, and *Moline Plough Company vs. Webb*, 141 U. S., 616, 623. Respondents have not attempted to answer these cases; they do not refer to them. In holding that a bill of exceptions was necessary petitioners contended that the Court of Appeals failed to give effect to applicable decisions of this Court. Petitioners, in their brief (pp. 9-14) filed prior to the present motion, have discussed this contention fully.

Respondents say (Motion, p. 2) that the order of the trial court was entered "after hearing at which witnesses testified and evidence was given of the extent and value of the estate and the services of the executors—none of which appears in this transcript." They can point to nothing in this record showing that testimony was taken. Assuming that it was taken, by their own admission it went to the extent and value of the services of the executors. This, petitioners contended in their petition (pp. 10, 12-13, 17), was not a question involved in the appeal from the trial court to the Court of Appeals. And that it is a question not

involved here petitioners show in their brief (pp. 9-14), to which the attention of the court is respectfully invited.

In the light of the authorities cited it is submitted that the sections of the D. C. Code and the cases cited by respondents in their motion (pp. 3-4) are not applicable, for they concern cases where alleged errors are not apparent to the appellate court except when shown in a bill of exceptions. They are not concerned with a case like this where error on a single question of law is apparent on the record without a bill of exceptions.

II.

Order Allowed Commissions on Stock Dividends.

Respondents are in error, it is submitted, in saying that the order of the trial court disallowed commissions on stock dividends. The order of the trial justice allowed the executors "$50,000 commission on increase in principal, instead of $78,596.47 claimed" (R., p. 99). The words "on increase in principal" could have reference to nothing but the alleged increase in principal involved in the stock dividends, for elsewhere in the account (R., p. 77) the executors make their claim of $78,596.47 refer specifically to a calculation of five percent upon "profits realized on inventoried items, and the par or face value of stocks received as dividends, viz., $1,571,929.32." This identification of the figure is shown also in the summary preceding the account (R., p. 42). This point also has been fully covered by petitioners in their brief (p. 6).

In discussing in the motion Sections 365 and 313 of the Code of the District of Columbia respondents say (p. 5):

> "The phrase 'amount of inventory or inventories,' as used in Section 365, has been understood in the District of Columbia to include any increase in assets or in value of assets during administration."

The question here involved is whether or not the stock dividends are "any increase in assets or in value." Petitioners contend they are not. They urged in their petition (pp. 10-11; 18-22) as the chief ground for the writ that the trial court and the appellate court below had virtually held stock dividends to be an increase in value and in so doing had not only departed from authority on the subject elsewhere but had failed to give effect in this regard also to applicable decisions of this Court, viz: *Gibbons vs. Mahon* (1890), 136 U. S., 549; 34 L. Ed., 525, and *Eisner vs. Macomber* (1920), 252 U. S., 189. These matters are discussed by petitioners fully in their brief (pp. 14-25); respondents do not purport to answer them nor refer to them.

None of the cases from this Court cited by respondents in their motion (p. 6) for the proposition that allowances to executors are discretionary in the trial court and for the amounts thereof are applicable to this case, for in none of them is it contended that the assets upon which commissions are claimed are not

subject to allowances. Here it is contended that discretion cannot be exercised because stock dividends are not the basis of any commission whatever.

III.

Questions Raised Substantial.

Respondents in their motion (p. 9) for the first time charge that the questions sought to be reviewed in these proceedings are not substantial. They saw fit to let the petition for the writ go unanswered and now instead of attempting to answer petitioners' brief, file this motion.

The substantial questions are that the court below failed to give proper effect to applicable decisions of this Court, viz., *Denver Board of Commissioners, etc., vs. The Home Savings Bank*, and *Moline Plough Company vs. Webb, supra*, in holding that a bill of exceptions was necessary where the error was apparent on the record; and *Gibbons vs. Mahon, supra*, and *Eisner vs. Macomber, supra*, in refusing to rule that commissions cannot be charged on stock dividends but by implication ruling to the contrary.

An examination of the equity suit decided by the Court of Appeals May 3, 1926 (12 Fed. (2d), 822), will show that the questions here raised with reference to the probate case are unchanged. There is neither in that case nor in this record any showing that Lawrence Maxwell has been displaced or substituted *as executor*. The guardian *ad litem* in the equity suit is not a party to this record nor concerned in the pro-

bate case, but a decision on the point here involved will presumably be of material assistance to him in future accountings in the equity suit. The statement as to disposition made in the equity suit of certain stocks is not in this record nor disclosed in the decision of the equity suit.

Whether or not a new inquiry as to commissions based upon a new appraisement would result in any allowances to the executors cannot now be determined as contended by respondents in their motion (p. 10), for upon such proceeding the inquiry would be presented, as respondents erroneously contend it is here, as to the extent and value of their services. It would then be a question for the trial court to answer whether or not any commission should be allowed over and above the admitted allowance of $12,390.72 on income (R., p. 99).

IV.

Court Below has Decided Inferentially that Commissions are Allowable on Stock Dividends.

Although the court below declines to pass upon the objection raised by petitioners that commissions are not properly allowable on stock dividends, it nevertheless embodies in its opinion (R., p. 104) the following language:

> "In this account the aggregate value of the estate is shown to be almost $5,000,000, and the executors, in addition to the claim for commission on income collected since the preceding account, 'also claim and hereby retain for their

> services a commission of five per cent upon profits realized on proceeds of inventoried items, *and the par or face value of stocks received as dividends, viz: $1,571,929.32 or $78,596.47.* The court below, evidently after a hearing in which all pertinent facts and circumstances were considered, reached the conclusion that the executors were entitled to $50,000 commission on increase in principal and made that allowance."

This language embodying the words in which italics have been supplied is, it is submitted, a tacit recognition of the legality of commissions on stock dividends. The dismissal of the writ of certiorari or the affirmance of the judgment of the court below would leave that judgment standing as an authority for that proposition fortified by the action of this Court in refusing to pass on the question.

For these reasons petitioners pray that the motions be overruled and that the case be heard upon its merits.

Respectfully submitted,

CHARLES V. IMLAY,
CHARLES E. WAINWRIGHT,
Counsel for Petitioners, James McDonald III and Alexander McDonald, Infants.

NOV 22 1928
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 147.

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS,

v.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

MOTION TO DISMISS AND AFFIRM, BRIEF AND NOTICE.

FREDERIC D. McKENNEY,
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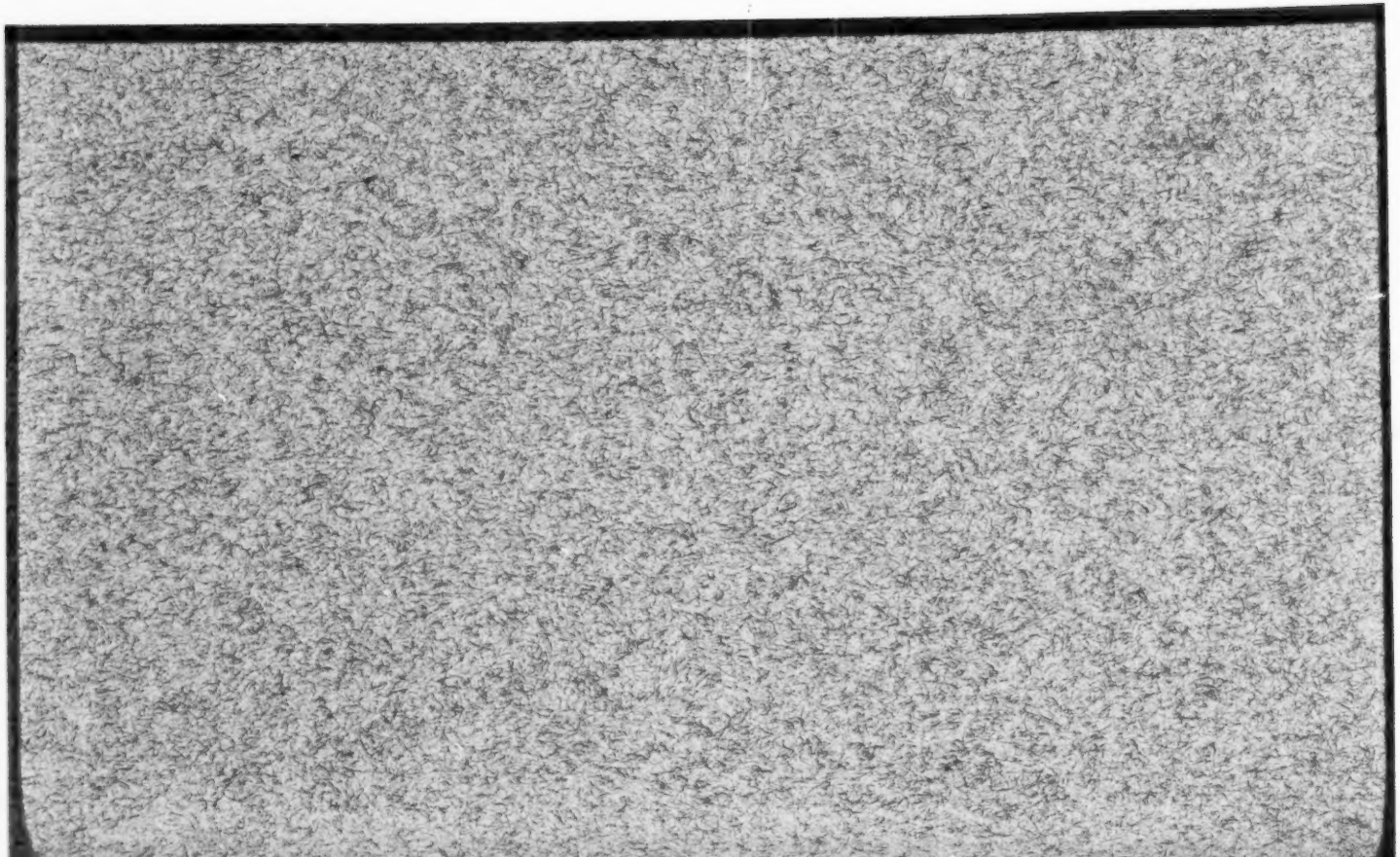
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 147.

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, PETITIONERS,

v.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

MOTION TO DISMISS AND AFFIRM AND BRIEF.

Now come the respondents, Lawrence Maxwell and the Fulton Trust Company of New York, executors of the last will and testament of James McDonald, and move the court to dismiss the writ of certiorari granted October 12, 1925, and affirm the judgment of the Court of Appeals of the District of Columbia entered May 4, 1925 (R., 104-105), for the reasons hereinafter set forth.

I

Absence of Record.

This cause is here by virtue of a writ of certiorari to review a judgment of said Court of Appeals affirming an order of the Justice of the Supreme Court of the District of Columbia, holding a probate court, approving the ninth and final account of said executors and allowing them "$12,390.72 commission on income, as claimed," and "$50,000.00 commission on increase in principal instead of $78,596.47 claimed" (R., 99).

This order was entered after hearing at which witnesses testified and evidence was given of the extent and value of the estate and the services of the executors—none of which appears in this transcript. There is no bill of exceptions as in actions at law; no statement of the evidence, as in suits in equity, and no record other than the report of the guardian *ad litem,* Charles V. Imlay, Esquire, upon the executors' ninth and final account, said account, the exceptions filed thereto prior to the hearing and the order of Mr. Justice Hitz approving the account and the proceedings on appeal therefrom (R., 104).

The probate court, so-called, is a special term of the Supreme Court of the District of Columbia and possesses all of the powers and jurisdiction formerly held and exercised by the old orphans' court of the County of Washington prior to June

21, 1870 (Code of Law for the District of Columbia, Sec. 116).

The jurisdiction and procedure of the old orphans' court prior to the adoption of the Code in January, 1902, was elaborately reviewed by Mr. Chief Justice Fuller in Kenaday *v.* Sinnott, 179 U. S., 606. Since the adoption of the Code, procedure in the probate branch of the Supreme Court of the District of Columbia is regulated by Sections 116 to 144 of said Code.

Under said sections of the Code, the probate court has exclusive jurisdiction of the proof of wills, the granting of letters testamentary, the settlement of the accounts of and allowances to executors and other fiduciaries (Code, Sections 116-119). Issues raised by caveats to the probate of wills and other issues relating to the estates of decedents are framed and tried under its jurisdiction (*Id.*, Sections 140-142). On the trial of such issues exceptions may be taken and preserved to the rulings of the court, as in cases of trials in the circuit court (*Id.*, Section 144). Such exceptions to the court's rulings, whether the case be tried with or without the intervention of a jury, must be stated in a bill of exceptions (*Id.*, Sections 70, 71, 73).

Proceedings in the probate court and final orders therein are reviewable only in accordance with the practice at common law, and evidence in such cases must be brought up in a bill of exceptions (Craighead *v.* Alexander, 38 App. D. C., 229, 234). In the absence of a bill of exceptions, the

Court of Appeals must assume that the evidence adduced at the trial was sufficient to justify the order from which the appeal is taken (Fletcher *v.* Fletcher, 43 App. D. C., 180).

Opinion of the Court of Appeals in this case (R., 104).

In the absence of a bill of exceptions, it will be presumed on appeal that the proceedings had in the court below were in all respects regular.

> Raymond *v.* United States, 26 App. D. C., 250.

Without a bill of exceptions in a law case or a statement of evidence in an equity suit, there is no record and no basis for an assignment of error reviewable in this Court.

> Metropolitan Railroad Co. *v.* District of Columbia, 195 U. S., 322.
>
> Jennings *v.* Railroad Company, 218 U. S., 255.

II.

Order Disallowed Commissions on Stock Dividends.

In the absence of any record indicating error or abuse of discretion, the order complained of will be deemed conclusive.

Allowances to executors are regulated by Section 365 of the District of Columbia Code, which reads:

> "Third. The allowance for things lost, or which have perished without the party's fault, which allowance shall be according to the appraisement. Fourth. His commissions, which shall be at the discretion of the court, not under one per centum nor exceeding ten per centum on the amount of the inventory or inventories, excluding what is lost or perished. Fifth. His allowance for costs, attorneys' fees, and extraordinary expenses which the court may think proper to allow."

Section 313 states what the inventories shall contain and provides:

> "And whenever, after an inventory has been returned, assets not therein included shall come to the knowledge of the executor, administrator, or collector an additional inventory and appraisement shall be promptly prepared and filed in the manner aforesaid."

Pursuant to the above provisions, it has been the practice in the District of Columbia, where there has been an increase in value of assets, for an executor to indicate the same in his accounts instead of filing a separate paper entitled "inventory of increase in principal," and where there has been a shrinkage in value, to claim credit therefor and make an appropriate deduction before calculating the final commissions.

The phrase "amount of inventory or inventories," as used in Section 365, has been understood

in the District of Columbia to include any increase in assets or in value of assets during administration.

Such allowances to executors and other fiduciaries are largely discretionary and the action of the court below is treated as presumptively correct and not the subject of review in an appellate court, except where the discretion has been palpably abused:

> Stuart *vs.* Boulware, 133 U. S., 78, 82;
> Trustees *vs.* Greenough, 105 U. S., 527, 537;
> Fowler *vs.* Equitable Trust Co., 141 U. S., 411, 415;
> Sinnott *vs.* Kenaday, *supra;*
> Magruder *vs.* Drury, 235 U. S., 106.

In Magruder *vs.* Drury, where the trustees were allowed a commission of five per cent on the principal and ten per cent on the income, this court said (p. 113):

> "This allowance met with the approval of both the District Supreme Court and the Court of Appeals, and seems to have the sanction of an earlier decision of this court, where it was said that such allowances were customary in Maryland and the District of Columbia. *Barney v. Saunders,* 16 How., 535, 542. We are not therefore prepared to disturb the decree of the courts below in this respect."

In their brief filed in this court, counsel for the petitioners say:

> "It will not be denied by these petitioners that the par value of the stock dividends is, with perhaps only one exception, less than the real market value of same at the time of the issuance of the stock dividends, nor that the market values thereof are in many instances much greater than the par values. The table (R., 25) in the report of the guardian *ad litem* shows that the market value is generally larger and in many instances much larger."

Notwithstanding this concession in their brief; the admissions contained in the report of the guardian *ad litem* (R., 24, 28, 33 and 38), and the finding of fact made by the trial court upon the evidence submitted that there was an increase in the principal of the estate, counsel for the petitioners endeavor to supplement the absence of any record to support their assignments of error and to overcome the *decision of the trial court that the executors were not entitled to a commission of* $78,596.47, *as claimed by them, on the par value of stock dividends as such,* by argument and inferences that the court must have based his allowance of a lump sum of $50,000 upon stock dividends and that this constitutes obvious error.

The trial justice was called upon to hear the testimony of witnesses, consider the ninth and final account of the executors and the commis-

sions payable to them covering the whole period of their administration, during which the guardian *ad litem* in his report, as in his brief here, frankly admitted a great increase in the value of the estate as the result of the careful management and watchfulness of the executors in retaining and handling fluctuating assets under the powers given them by the will of the testator, who directed that they should have "as full and complete powers as regards the management of the estate as I myself would have if living." In his report the guardian *ad litem* had suggested that any further sum to be allowed for commissions in this account "should be by way of an increase on the rate of commission on the income strictly speaking" (R., 24), but submitted that the rate should not be exceeded.

It is not apparent by what process of reasoning or method of calculation the trial justice arrived at the amount fixed, but the allowance made was well within the percentages authorized by Section 365 of the Code, *supra,* and it is not suggested that he was guilty of any abuse of discretion. In the absence of any record or specific showing to the contrary, the Court of Appeals under the decisions of this Court was bound to assume the regularity of the proceedings and the correctness of the conclusions reached by the trial justice.

III

Questions Raised Not Substantial.

In their brief (p. 4), counsel for the petitioners invite attention to the fact that a suit to construe the will of James McDonald was instituted in the Supreme Court of the District of Columbia and resulted in a decision of the Court of Appeals of said District on May 3, 1926, defining the rights and estate of the testator's child and grandchildren (54 Wash. Law Rep., 654; 12 Fed. (2d), 822). In this equity proceeding the respondent Lawrence Maxwell was permitted to retire as executor and trustee because of ill health and Joseph S. Graydon was duly substituted as his successor. A first account of the trustees covering the period from the date of the ninth and final account of the executors to the date of the retirement of Mr. Maxwell, showing the previous allowances of the court and the principal and income of the estate to be held and/or distributed in accordance with the decision of the Court of Appeals in the construction suit, awaits the determination of this controversy over executors' commissions. In this equity proceeding, Ralph D. Quinter, Esquire, was appointed guardian *ad litem* and counsel for the infant defendants, James McDonald, III, and Alexander McDonald, the infant petitioners herein. In order to set aside the shares of the respective beneficiaries, including said infants, as determined by the

decision of the Court of Appeals, the trustees have disposed of a large portion of the stocks theretofore received by them and their predecessors in title as stock dividends.

In their brief filed in this Court (p. 22), counsel for the petitioners say:

> "Petitioners submit that the proper method of listing the stock dividends would be to take the appraised values at the date of the ninth account, both of the remaining original stocks and the new shares received as dividends. If these appraised values of both would indicate an increase over the appraised value of the original stock, this increase would constitute a profit on inventoried items similar in kind to the small item of $1,604.32 hereinbefore mentioned."

If, therefore, the petitioners should prevail in their contentions in this case, the respondents, upon a restatement of their account and a reappraisement of the assets in accordance with the above suggestion, would be entitled to claim additional commissions upon the increase in the principal of the estate as indicated by such reappraisement and/or the amount realized from the sale of the dividend stocks. While the trustees thereby might be greatly benefited, the infant petitioners and their father, James McDonald, Jr., would not be advantaged.

It is therefore respectfully submitted that the questions raised by counsel for the petitioners are

no longer substantial, even if originally debatable under decisions giving consideration to stock dividends as between life tenants and remaindermen or under the provisions of the income tax law.

Your respondents therefore pray that the writ of certiorari may be dismissed and/or the judgment below affirmed.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
Attorneys for Respondents.

JOSEPH S. GRAYDON,
EDWARD DE WITT,
Of Counsel.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1926.

No. 147.

JAMES McDONALD, JR., and JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM, CHARLES V. IMLAY, *Petitioners,*

v.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

NOTICE OF SUBMISSION OF MOTION TO DISMISS AND AFFIRM.

Please take notice that the respondents, on the 6th day of December, 1926, at the opening of court on that day or as soon thereafter as counsel can be heard, will submit to the Supreme Court of the United States, at the Capitol in the City of Washington, D. C., their motion to dismiss the writ of certiorari and affirm the judgment of the court

below in the above-entitled cause, a copy of which motion and supporting brief is attached to this notice.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
Attorneys for Respondents.

JOSEPH S. GRAYDON,
EDWARD DE WITT,
Of Counsel.

To:

Messrs. Allison & Lynch, Hamilton & Hamilton, Attorneys for James McDonald, Jr.;
Charles V. Imlay, Esquire, Guardian *ad litem* for James McDonald, III, and Alexander McDonald, Infants;
Ralph D. Quinter, Esquire, Guardian *ad litem* for said Infants in Equity Cause No. 40,082, Supreme Court, District of Columbia.

Service of the foregoing notice, together with copy of motion to dismiss and affirm and supporting brief, admitted this — day of November, 1926.

FILED
JAN 19 1927
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 147.

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM CHARLES V. IMLAY, PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

BRIEF FOR RESPONDENTS.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
Attorneys for Respondents.

JOSEPH S. GRAYDON,
EDWARD DE WITT,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 147.

JAMES McDONALD, JR., AND JAMES McDONALD, III, AND ALEXANDER McDONALD, INFANTS, BY THEIR GUARDIAN AD LITEM CHARLES V. IMLAY, PETITIONERS,

vs.

LAWRENCE MAXWELL AND FULTON TRUST COMPANY, EXECUTORS.

BRIEF FOR RESPONDENTS.

The case is here on writ of certiorari granted October 12, 1925 (R., 106), to review a judgment (R., 105) of the Court of Appeals of the District of Columbia passed May 4, 1925 (petition for certiorari was filed June 19, 1925, p. 1 of cover), affirming with costs a judgment of the Supreme

Court of the District of Columbia holding a probate court (R., 99) whereby the "Ninth and Final Account of Lawrence Maxwell and Fulton Trust Company of New York, Executors under the will of James McDonald, deceased, after hearing, examination and consideration by the court, was "approved and passed" and there was allowed to said Executors "$12,390.72 commission on income, as claimed" and "$50,000 commission on increase in principal instead of $78,596.47 claimed" (R., 99).

In course of its opinion, disclosing the grounds for its conclusions, the Court of Appeals (D. C.) speaking, per Mr. Justice Robb, said in part:

> "There is no bill of exceptions in the present case, nor does the record contain or purport to contain the substance of the testimony in the case. We have before us, on the contrary, merely the final account of the Executors and the ruling of the court thereon. * * * The court below, evidently after a hearing in which all pertinent facts and circumstances were considered, reached the conclusion that the Executors were entitled to $50,000 commission on increase in principal and made that allowance. The facts and circumstances upon which this allowance was based are not before us, and, there being nothing on the face of the record to indicate error, it is apparent that the judgment must be affirmed with costs, and it is so ordered" (R., 104).

As basis for such conclusion and no doubt by way of enlightenment also, the learned court declared that:

> "A proceeding in the Probate Court in this jurisdiction and final orders therein are reviewable only in accordance with the practice at common law, and evidence in such cases must be brought up in a bill of exceptions. *Craighead vs. Alexander,* 38 App. D. C., 229, 234. In the absence of a bill of exceptions this Court (Court of Appeals, D. of C.) must assume that the evidence adduced at the trial was sufficient to justify the order from which the appeal is taken. *Fletcher vs. Fletcher,* 43 Apps. D. C. 180" (R., 104).

and if so minded, it appropriately might have added to its citation of authorities the following cases decided here:

Mich. Ins. Co. vs. Eldred, 143 U. S., 293, 298.

Jennings vs. Phila., B. & W. R. Co., 218 U. S., 255, 256.

U. S. ex rel. Kinney vs. United States Fidelity & Guaranty Co., 222 U. S., 283.

Petitioners, contending that the only question involved in the proceedings, viz., "whether or not stock dividends constituted additional capital entitling executors to charge the estate with a commission thereon * * *" so "sufficiently ap-

peared from the pleadings and proceedings of record" as to render bill of exceptions unnecessary, citing *Saks vs. Steinmetz Company*, 54 App. D. C., 38, 40 by way of authority, ~~and~~ suggest that:

> "The record in this case disclosed that there were no 'pertinent facts and circumstances,' to be construed other than the claim made by executors for commissions on stock dividends and the exceptions of petitioners thereto upon the ground that stock dividends cannot be considered as an increase of either capital or income" (Petition, p. 10).

In view of the fact that the record before the Court of Appeals as well as before this Court, as said by the former court, neither contains nor purports "to contain the substance of the testimony in the case," but as per certificate of the clerk of the Supreme Court of the District of Columbia, only a transcript "of proceedings had in said cause according to the designation of counsel (for petitioners) filed therein" (R., 102) the deduction above asserted and relied upon both in the petition and brief in support thereof for reversal would seem to involve a somewhat violent and probably unsupportable presumption.

The fact is that at least two witnesses were sworn and gave testimony before the trial court.

Petitioners further assert that the inferences deducible from the judgment of affirmance com-

plained of are "in direct conflict with the holdings of this Court" in the cases of:

> *Towne vs. Eisner,* 245 U. S., 418.
> *Eisner vs. Macomber,* 252 U. S., 189.
> *Gibbons vs. Mahon,* 136 U. S., 549.

and assign as grounds for granting certiorari that:

> "(*a*) The propriety of allowing executors' commissions based on stock dividends is a novel and important question not heretofore decided by this Court; and
>
> "(*b*) The effect of the decision below *in allowing stock dividends* (*sic*) violates the rules announced by this Court in *Eisner vs. Macomber, supra,* and in other cases" (Petition, p. 11).

As the case is here, it may be assumed from the fact that the petition was granted that this Court was of opinion, at least momentarily, that the grounds assigned and above outlined were truly based in the transcript of record before the court and were, in law as well as in fact, substantial.

We do not in this brief advert to petitioner's grounds numbered 2 and 3 (Petition, pp. 10 and 11), which relate to the ruling of the Court of Appeals respecting absence in the premises of a bill of exceptions, as such ruling, whether right or wrong, only involves a matter of purely local practice, not in any sense or view of grave or wide-

spread and/or general interest, and consequently unlikely to be accepted by this Court as basis for issuing its writ of certiorari. That the judgment of the Court of Appeals, when viewed solely in such aspect, was correct, we believe to have been demonstrated by our brief on file in support of the motion to dismiss heretofore filed herein and to which reference is now here made for such further consideration as the court may think desirable.

It is true that both *Towne vs. Eisner,* 245 U. S., 418, and *Eisner vs. Macomber,* 252 U. S., 159, did decide that stock dividends did not and in view of existing constitutional restrictions properly could not be deemed to constitute income within the purview of the Federal income tax laws, whether the surpluses against which stock dividends were declared had been earned prior or subsequent to January 1, 1913, the effective date for the Sixteenth Amendment. It is equally true that the latter case, notwithstanding certain expressions in the opinion *arguendo* much relied upon by petitioner, to effect "that the stockholder has received nothing out of the company's assets for the separate use and benefit," and (*Gibbons vs. Mahon,* 136 U. S., 559, 560), "a stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders and the proportional interest of each shareholder remains the same," quite plainly and trenchantly declares (p. 202) that such stock div-

idends constitute "capital as well for the purposes of the income tax law as for the distribution between tenant for life and remainderman (*Gibbons vs. Mahon, supra*), and that "the antecedent accumulation of profits evidenced thereby, *while indicating that the shareholder is the richer because of an increase of his capital,* at the same time shows that he has not realized or received *any income* in the transaction." Again, (p. 213 "* * * without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show *that to tax a stock dividend is to tax a capital increase* and not income, * * *" Again, (p. 214) "*enrichment through increase in value of capital investment* is not income in any proper meaning of the term."

And again, commenting upon the Government's contention that *Collector vs. Hubbard,* 12 Wallace, 1, 17, since the Sixteenth Amendment was authority for the power of the Congress to levy a tax on the stockholder's share in the accumulated profits of the corporation, even before division by the declaration of a dividend of any kind, said (p. 218): "Manifestly this argument must be rejected, since the amendment applies to income only, and *what is called the stockholder's share in the accumulated profits of the company is capital,* not income." (All italics supplied.)

What the courts of the District of Columbia have dealt with in the instant case is an asserted increase in the principal of the decedent's estate while in the course of being administered pursuant to provisions of law of the District of Columbia—a purely local law and a matter of purely local concern, and this whether the asserted increase in capital be evidenced by stock dividend certificates or otherwise.

That the capital assets of this estate most substantially increased subsequent to the filing of Executors' Eighth Account cannot truthfully be denied, and is demonstrated by inspection of the Ninth Account, which the learned trial justice "after examination" "approved and passed" (R., 42, 43, 83, 84-91, 99).

On approval of the Eighth Account the Executors stood charged with and were bound to account for an aggregate balance of both principal and income of $3,275,759.67 after the payment of administration expenses, annuities provided by the will and the commissions allowed the Executors, aggregating a sum total in excess of $190,000, the Executors stand charged with and are bound, under their Ninth Account as approved, to account for an aggregate balance of principal and income

of $4,902,638.36

a net increase of..... 1,626,878.69

No one denies or even doubts that the securities and cash deposits described in the report are in possession of the Executors charged therewith,

and the Deputy Register of Wills so certifies (R., 99).

The bases of such increase and the details, including the character thereof, are itemized and accounted for in and by the Executor's Ninth Account and both they, individually, and their bond, are bound and liable therefor.

That the bases of the reported increase constitute assets not included in the original inventory and which are required by section 313, Code, D. C., to be reported to the court, and included in supplemental inventories, will not be denied or seriously questioned by any practitioner before this or the local bars.

The existing law of administration in the District of Columbia is based upon and intimately commingled with the Act of Maryland of 1798, ch. 101, Compiled Laws, D. C. (Abert), pp. 1-42, and the phraseology of the several provisions respecting inventories and the characteristics thereof, and allowance by way of commissions to executors in the two statutes is very much alike, and in *Handy vs. Collins, Exec'r*, 60 Maryland, 229, 242, citing *McPherson vs. Israel*, 5 Gill & Johnson, 50, it is said:

> "* * * the inventory of the deceased's estate, and in an enlarged construction of this, all assets accounted for by the administrator, is the true standard by which to ascertain the (executor's) commissions"

and page 244:

> "an enlarged construction of the term 'inventory' properly includes assets accounted for by the administrator."

It is not the general practice of executors in the Supreme Court of the District of Columbia—Probate Court—to file additional inventories when assets not included in the original inventory have come to their knowledge, but the exigency of the statute in such regard is deemed sufficiently complied with when such new assets are stated in succeeding accounts. If, for any reason further appraisals are required, the justice holding probate court takes requisite action or issues appropriate orders.

The Executors are entitled by the law (Code, D. C., sec. 365) to commissions "at the discretion of the court, not under one per centum nor exceeding ten per centum on the amount of the inventory or inventories. * * *"

The receipt of new assets is shown by the Executors' Account. The increase in principal of the estate due to the receipt of such new assets likewise appears therefrom. The new assets and the resulting increase have been accounted for and the Executors stand charged therewith.

If the reported increase is not real but merely fictitious; if the new assets received have, in fact, added nothing of value to what the estate of de-

cedent already possessed, the Executors should be absolved from accounting with respect thereto.

If the capital of the estate in fact has been enriched thereby, and the evidences of such enrichment were not known to exist and were not included by the Executors in their principal inventory and consequently nothing by way of commission had been allowed to them at any time with respect thereto, it would seem to be quite plain under the law that the order of the justice holding probate court affords no ground for complaint.

The ascertained increase in principal based on the par of the new shares received was in excess of $1,500,000. The commission allowed was $50,000, or at the rate of say 3 1/3 per cent. But in almost every case the par of such shares was less than their actual market value at date of receipt, and such spread has since increased. As appears from the guardian *ad litem's* memorandum comparison of the par and market values of the shares here in question, the latter exceeded the former by $1,421,949, *i. e.*, market, $3,002,374; par, $1,570,325 (R., 25), and on the basis of market value, which well might have been claimed as the true basis had inventory and appraisement been required, the allowance made is at the rate of less than 2 per cent—approximately one and two-thirds. No abuse of discretion on part of the learned trial justice is charged, and upon this showing none well could be.

The Pennsylvania cases cited in petitioner's briefs are inapplicable in any respect or aspect to the question at bar because of differences in the statutes under which the questions for decision arose.

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